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IN THE

Supreme Court of the United States

No. 75-1779

OCTOBER TERM, 1975

JACK L. CHESTNUT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Jack L. Chestnut, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, but is found in the Appendix. The district court's opinion of April 8, 1975, is reported at 394 F. Supp. 581, and the same court's opinion of June 25, 1975, is reported at 399 F.Supp. 1292; both are also found in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1976. A petition for rehearing was denied on May

5, 1976. (The order denying rehearing is included in the Appendix.) This petition is filed within thirty days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1254. The district court's jurisdiction was invoked by indictment.

QUESTIONS PRESENTED

I. Whether the indictment for a 1970 offense was ex post facto because drawn and returned under a later enactment?

II. Whether the applicable versions of 18 U.S.C. §§591 and 610 were unconstitutionally vague as applied to receivers of contributions because the controlling definitions required persons of common intelligence to guess and differ as to whether a given transaction was an "expenditure" (lawful to receive) or a "contribution" (unlawful to receive)?

III. Whether venue of the offense of causing another to receive an unlawful contribution in New York was established where every act of causation by the defendant was elsewhere, where the agreement which constitutes the offense was made elsewhere, where the actual receipt by the third party was (so far as the evidence showed) elsewhere, and where the only nexus to New York was the deposit of the payment in a New York bank?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9, Clause 3:

No Bill of Attainder or ex post facto Law shall be passed.

Article III, Section 2, Clause 3:

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS AND RULE INVOLVED

Because they are lengthy, the following statutes and rule are set forth verbatim in the Appendix:

Tillman Act (1907), 34 Stat. 864
Federal Corrupt Practices Act (1925) 43 Stat. 1070
Taft Hartley Act (1948) 62 Stat. 719, 63 Stat. 90
Federal Election Campaign Act (1971), 84 Stat. 854, 86 Stat. 8, 10
Federal Election Campaign Act Amendments (1974) 88 Stat. 1263 et seq.
18 U.S.C. §2, 65 Stat. 717
18 U.S.C. §3237, 62 Stat. 826, 72 Stat. 512, 80 Stat. 1108
Rule 18, Federal Rules of Criminal Procedure

STATEMENT

The evidence and procedural progress of the challenged conviction are recited at length in the three opinions below, all of which are included in the Appendix hereto. To avoid burdensome repetition, therefore, we set forth here as briefly as practicable only the facts pertinent to the specific issues raised in this petition. Because a careful and close reading of the statutes involved is necessary to comprehend the arguments upon the *ex post facto* nature of the prosecution and the unconstitutional vagueness of the statutes, we have included in the Appendix the texts of the various acts which since 1907 have governed corporate contributions.

As mangaer of Hubert Humphrey's 1970 senatorial campaign, Petitioner Jack Chestnut agreed to have Associated Milk Producers, Inc. (AMPI) (a dairy marketing cooperative and long-time Humphrey supporter) pay some $12,000 for services rendered to the campaign by Lennon

& Newell (L&N) an advertising agency. The principal factual issue was whether Mr. Chestnut knew the payments were to be made unlawfully from the AMPI corporate account (as in fact they were) or lawfully from the cooperative's political fund (as Mr. Chestnut testified he believed they would be).

An indictment obtained by the Watergate Special Prosecutor was filed December 23, 1974, in the Southern District of New York, charging violation of 18 U.S.C. §§2 and 610, and alleging that Mr. Chestnut caused L&N to receive an unlawful corporate contribution from AMPI.[1] Attached to the indictment as provided to Petitioner and the press was what was described as a copy of the "appropriate statutes." In fact, however, the attached statutes were not those in effect in 1970 (the Taft-Hartley Act) at the time of the alleged offense, but provisions from the Federal Election Campaign Act of 1971, and the latter embodied significant changes in the operative definitions.[2]

Because the statutes are confusing, it is difficult to present the pertinent facts without confusion; in outline they are these:

Section 610 prohibits the *making* of either "contributions" or "expenditures" by corporations, but prohibits the *receiving* of only "contributions" and not of "expenditures." If the payments here were "expenditures," therefore, it was no crime to receive them or cause another to receive them.

---

[1]The newly amended statute of limitations, reduced from 5 to three years, would have barred the prosecution after midnight December 31. 2 U.S.C. §455. Pub.L. 92-225, Title IV, §406, as added Pub.L. 93-443, Title III, §302, Oct. 15, 1974, 88 Stat. 1289. (The text is contained in the Appendix.)

[2]The text of each version of each statute is contained in the Appendix.

In 1970, Section 591 defined "contribution" as "a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable."

Section 591 defined "expenditure" as "a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable."

Although these definitions largely overlap there are two crucial differences: the terms "payment" and "distribution" are forms of "expenditure" but not of "contribution." Therefore *in 1970* it was not unlawful to receive a "payment" or a "distribution" (because it was not unlawful to receive an expenditure); after the 1971 amendments, however, the words "expenditure" and "contribution" were identically defined in §610, (although other, different definitions continued to be included in §591), and both now included "any direct or indirect payment" or a "distribution." (Federal Election Campaign Act of 1971, see Appendix.)

At the hearing on Petitioner's motion to dismiss the indictment as *ex post facto*, Government counsel[3] failed either to assert that the proper Taft-Hartley act had been used, or to deny that the improper later 1971 statute had been used, by the Grand Jury when it returned the indictment. (Appendix in the court of appeals, 68-69.)[4] The trial court

[3]The case was transferred from the Watergate Special Prosecutor to the United States Attorney for the Southern District of New York for purposes of trial. (Appendix in court of appeals, 5-8.)

[4]Petitioner has caused the Appendix in the court of appeals to be lodged with the Clerk of this Court.

denied the motion to dismisss[5] and the Court of Appeals affirmed, holding that the indictment stated an offense under the 1970 statute and, in any event, the defense could not have been misled by the apparent use of the wrong statute.

A petition for rehearing was filed, asserting that the Court of Appeals had overlooked or misconstrued the true issue, to wit: that if the proper statute had been presented to the grand jury there may well have been a decision not to indict since the definitions of "contribution" and "expenditure" had been materially changed by the intervening amendments, and what was arguably a "contribution" (unlawful to receive) in 1972, may have been reasonably construed as an "expenditure" (lawful to receive) in 1970. The petition for rehearing was denied.

Closely related to the *ex post facto* question, because both involve the proper construction of "contribution" and "expenditure," is Petitioner's attack on Sections 591 and 610 as unconstitutionally vague. The trial judge rejected this argument in its opinion of April 8, 1975, 394 F. Supp. at 587-591, and the court of appeals adopted this reasoning in reaching the same result. A petition for rehearing alleging that that result depended upon a construction of ambiguous penal legislation in favor of the Government rather than in favor of the accused was denied. Neither the trial court nor the court of appeals came directly to grips with Petitioner's contention that the crucial definitions of "contribution" and "expenditure" were either so

[5]A defense request that the jury be allowed to determine whether the payments in question were contributions or expenditures was denied, (Appendix in the court of appeals, 685, 723), and instead the court instructed the jury in effect that a payment from AMPI to L&N for services to Humphrey was a contribution. (Appendix in the court of appeals, 663-664.)

ambiguous as to be unconstitutional or, if properly construed in favor of the accused, required a conclusion that the payment here was an "expenditure," lawfully received.

The indictment alleged that the Petitioner's violation occurred "in the Southern District of New York and elsewhere," but there was no evidence (as the court below conceded) that Petitioner did any act or was even present in New York; the only nexus proved to New York was the ultimate deposit of the AMPI checks in the L&N account in a New York bank. Petitioner's motions for judgment of acquittal for failure to prove venue were denied, his requests to charge the jury as to proof of venue were rejected, and the court of appeals found deposit of the checks in the New York bank sufficient to establish venue. A petition for rehearing on this issue on the grounds the court below had overlooked its own controlling decisions, and had misapplied in this 18 U.S.C. §2 causation case law applicable only to conspiracies or aiding and abetting or continuing offenses, was denied.

REASONS FOR GRANTING THE WRIT

I. The Ex Post Facto Indictment

All the evidence, internal and external to the indictment, indicates that Petitioner was accused of a 1970 offense under a statute significantly amended at a later date. The language of the indictment, the citation of the statute in the indictment, and the circumstantial evidence of the text of the statute attached by the prosecutor himself to that indictment, all tend persuasively to show this. Moreover, (a fact ignored by the court below) at the hearing on this issue defense counsel specifically asked of Government counsel whether the indictment was drawn and returned

under the correct 1970 or the improper later statute. No direct answer was forthcoming; rather Government counsel said:

> Your Honor, all I can say in that regard is I have spoken to Mr. Turcom [sic. Mr. Turckheim, Assistant Watergate Special Prosecutor] who presented the case to the grand jury, and he advises me that he is fully aware that the statute was amended in 1972, but beyond that I am not at liberty to discuss the proceedings in the federal grand jury in this district. (Appendix in the court of appeals, 68-69)

This evasive response is most significant, saying as it does (in the present tense) that the prosecutor *is* aware of the amendment, but refusing to assert that the proper statute was in fact used.

The court below evades this problem, however, by focusing on its determination that the indictment states an offense under the 1970 statute; but this in turn requires a strained construction of the statute and the indictment in favor of the Government. The indictment describes the offending transaction as a "payment" for "services." (Appendix in court of appeals, 10) Under the 1970 statute a "payment" was an expenditure and not a contribution, and the word "services" did not appear at all; the amendment added "payment" to the definition of contribution and inserted "services."

An indictment under §591 would certainly have referred to a "contribution" by one of the applicable terms: "gift, subscription, loan, advance, or deposit," because receipt of a "payment" did not state an offense at that time. Therefore, solely from a reading of the indictment, it is apparent the indictment refers *ex post facto* to the amended

statute. And there is other circumstantial confirmation that this was the case.

The indictment (in 1974) cites the statute as merely 18 U.S.C. §610, with no allusion to the Statutes at Large or indication that any version other than the one in force at the time of indictment was contemplated; there is no reference to §591. Rule 7(c), Federal Rules of Criminal Procedure, requires that:

> The indictment . . . shall state . . . the official or customary citation of the statute . . . which the defendant is alleged to have violated.

The official or customary citation here would have been to "18 U.S.C. §591 and §610 (1970), *as amended*, 18 U.S.C. §610;" or to the Statutes at Large. (See *A Uniform System of Citation*, Harvard Law Review Association, Sections 4:2:3(b), 4:3(b).) And even where amendments are not referred to, it has been held:

> Obviously, a citation to an existing official code section includes all amendments thereto in force. *Jackson v. United States*, 325 F. 2d 477, 479 (8th Cir. 1963).

It is true that miscitation per se will not invalidate an indictment in the absence of prejudice, but that is not the point; here the citation is evidence that the wrong law was applied to Petitioner's conduct. The issue is not whether the indictment misled Petitioner, but whether the indictment would have been returned at all under the proper law.

As long ago as *Kring v. Missouri*, 107 U.S. 221, 235 (1882), this Court stated the proscription upon ex post facto prosecution thus:

> No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.

And as recently as *Boule v. Columbia*, 378 U.S. 347 (1964), this Court undertook a detailed review of the *ex post facto* doctrine as it relates to vague legislation, striking down the retroactive judicial construction of a state law. Reasoning first that "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness," and that vagueness in a law cannot "be cured in a given case by a construction in that very case placing valid limits on a statute," the Court reasserted that the "required criminal law must have existed when the conduct in issue occurred". 378 U.S. at 352-354.

The amendment provided a new answer to the question raised: Was the "payment" a "contribution" in 1970? Inevitably the grand jury would answer affirmatively under the 1972 amendment; but under the proper §591 provisions, we submit, the answer would be in the negative, or very much in doubt.

That doubt infected these entire proceedings, but Petitioner was denied the benefit of the interpretation to which he is constitutionally entitled, in the grand jury, the trial court, and the court of appeals.

It is perhaps significant that until the present case there were no reported decisions construing §591 and §610 as applied to receivers of contributions, doubtless because there had been few or no previous prosecutions in that pre-

scription's long history. And ironically the applicable statute of limitations was reduced from five to three years effective only days after this indictment, doubtless in part at least because of congressional uncertainty as to the Taft-Hartley Act's interpretation.

In these extraordinary circumstances the Petitioner was entitled to but was denied a resolution of the statute's ambiguity in his favor; the Government enjoyed the benefit of each doubt without being required even to establish, as it surely could have, which law it had used for its accusation. The question is important and this Court's review is appropriate because of the danger that the decision below may presage a weakening of safeguards against *ex post facto* prosecutions.

II. The Vagueness of the Statutes

The courts below construed the indictment as describing a "gift," (despite the indictment's failure to use that term, and despite the indictment's use of the word "payment" which in 1970 described an expenditure), and thus side-stepped the central issue of the statute's facial vagueness.

We may demonstrate that fatal vagueness by setting these statutes forth, and asking: What is a "contribution" as opposed to an "expenditure"? And under which term falls the payment of a campaign's bills by a third party?

The operative language of 610 provides:

> It is unlawful . . . for any corporation whatever . . . to make a *contribution or expenditure* in connection with any [federal] election . . . or for any . . . person to accept or receive any *contribution* . . . .

Section 591 in its applicable form read:

> When used in [section 610]—
>
> The term "contribution" includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable;
>
> The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable;

Can a potential *receiver*, of common intelligence, be expected to determine from this language that payment of a campaign bill by a third party is a "gift, subscription, loan, advance, or deposit" within the definition of contribution, and not a "payment" or "distribution" within the definition of expenditure? Or would reasonable men be required to guess and expected to differ on the question?

Since all the reported decisions involve prosecutions of donors, and it is a crime to *make* either a contribution or expenditure, no court has analyzed the distinction where a donee is charged.

The Tillman Act of 1907, followed by the Corrupt Practices Act of 1925, prohibited the giving and receiving of corporate contributions. The Taft-Hartley Act of 1947 added a prohibition on the making (but not the receiving) of expenditures. (See Appendix for texts.)

The Taft-Hartley Act was promptly reviewed in *United States v. C.I.O.*, 335 U.S. 106 (1948), involving a union publication alleged to be an unlawful "expenditure". The Court summarized as follows the legislative intention for adding "expenditure" to "contribution" in the Act:

> When Congress began to consider the Labor Management Relations Act of 1947 it had as a guide the 1944 presidential election, an election which had been conducted under the above amendment to the Act of 1925. In analyzing the experience of that election, a serious defect was found in the wording of the Act of 1925. The difficulty was that the word "contribution" was read narrowly by various special congressional committees investigating the 1944 and 1946 campaigns. *The concept of "contribution" was thought to be confined to direct gifts or direct payments.* Since it was obvious that the statute as construed *could easily be circumvented through indirect contributions,* §304 extended the prohibition of §313 to "expenditures". 335 U.S. at 115 (emphasis supplied).

Thus the *C.I.O.* decision settled that "expenditures" are *indirect payments* which were not included in the definition of "contributions". The Court declined to pass upon the Constitutional question. Significantly, however, five Justices discussed the Constitutional defects of the statute, four outright declaring its unconsitutionality:

> The crucial words are "expenditure" and "in connection with". Literally they cover any expenditure whatever relating at any rate to a pending election, and possibly to prospective elections or elections already held. The broad dictionary meaning of the word "expenditure" takes added color from its context with "contribution". The legislative history is clear that it was added by the 1947 amendment expressly to cover situations not previously included within the accepted legislative interpretation of "contribution". (Footnote omitted.) The coloration added is therefore not restrictive: it is expansive.
>
> . . . . .

> A statute which, in the claimed interest of free and honest elections, curtails the very freedom that makes possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election, serving as a prior restraint upon expression not in fact forbidden as well as upon what is, cannot be squared with the First Amendment. 335 U.S. at 133, 155.

But for the exercise of judicial restraint by the majority of five Justices it seems clear the statute would have perished as early as 1948; even the majority acknowledged that if the Defendant's conduct *were* covered by the statute "the gravest doubt would arise in our minds as to its constitutionality". 335 U.S. at 121.

This is reaffirmed in *United States v. Auto Workers,* 352 U.S. 567 (1957), where the union was charged with paying for television broadcasts favoring certain candidates. The District Court had dismissed the indictment, saying the payments were not within the statute, but the Supreme Court reversed. Noting the findings of the Senate's Special Committee on Campaign Expenditures, whose investigation of the 1944 elections led to the Taft Hartley Act, the Court observed:

> The Committee found "no clear-cut violation of the Corrupt Practices Act on the part of the Political Action Committee" on the ground that it had made direct contributions only to candidates and political committees involved in state and local elections and federal primaries, to which the Act did not apply, and had limited its participation in federal elections to political "expenditures," as distinguished from "contributions" to candidates or committees. S.Rep.

No. 101, 79th Cong., 1st Sess. 23. 352 U.S. at 580.

. . . . . .

> As indicated by the reports of the Congressional Committees that investigated campaign expenditures, *it was to embrace precisely the kind of indirect contribution alleged in the indictment that Congress amended §313 to proscribe "expenditures"* . . . . 352 U.S. at 585 (emphasis supplied).

A payment of the same sort by a corporation was held an "expenditure" in *United States v. Lewis Food Company*, 366 F. 2d 710 (9th Cir. 1966). Compare *United States v. Anchorage Cent. Labor Council*, 193 F. Supp. 504 (D.C Alaska 1961) finding union broadcasts not within the statutes. And in *United States v. Painters Local Union No. 481*, 172 F. 2d 854 (2nd Cir. 1949), the Court *sua sponte* found a union's payment for broadcasts not within the statute (and thereby avoided the Constitutional issues, which it acknowledged were very real).

In *Pipefitters v. United States*, 407 U.S. 385 (1972), this Court added a further gloss upon the scope of §610 as applied to expenditures by unions, but avoided the ultimate constitutional questions. See *United States v. First Nat. Bank*, 329 F. Supp. 1251 (D.C. Ohio, 1971), and compare *United States v. Boyle*, 482 F. 2d 755, 763-764 (C.A.D.C. 1973), where an attack on the constitutionality of §610 was rejected, but this Court denied certiorari. 414 US. 1076.

Since those decisions this Court has handed down *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Gooding v. Wilson*, 405 U.S. 518 (1972), and *Coates v. Cincinnati*, 402 U.S. 611 (1971), striking down legislation as unconstitu-

tionally vague even though the defendants' conduct was not protected. In *Coates* the Court said:

> Although a statute may be neither vague, overbroad, nor otherwise invalid, as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights. 402 U.S. at 619-620.

The versions of §§610 and 591 in question here enjoyed very precarious Constitutional health and would surely have expired under application of the *Coates* principle. Whether the very stringent criteria for statutes affecting speech are invoked, however, or the Constitutional desiderata of all penal legislation, it cannot be said that the provisions under which Petitioner was convicted have the required certainty.

The cases involving indirect payments similar to the AMPI payments describe them as "expenditures", and that is the only fair construction, the Constitutionally required construction here. For if doubt remains, any ambiguity in penal legislation must be resolved in favor of the accused, *Rewis v. United States*, 401 U.S. 808, 812 (1971).

As Chief Justice Marshall said in *United States v. Wiltberger*, 5 Wheat. 76, 96 (1820):

> To determine that a case is within the intention of a statute, its language just authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

And the Second Circuit court itself in *United States v. Posnjak*, 457 F. 2d 1110, 1118 (2nd Cir. 1972), invoked the "well-established principle that criminal statutes are to be narrowly rather than expansively construed," and noted that:

> Judicial "revision" or "expansion" of criminal statutes may lead to problems of vagueness under the due process clause, for the statute on its face may not adequately warn individuals of what it proscribed. 457 F. 2d at 1118, note 9.

Similarly in *United States v. Canton*, 470 F. 2d 861 (2nd Cir. 1972) the Court observed:

> if there were any doubt or any conflict in interpretation of the statutes, it must be resolved in favor of the appellant. 470 F. 2d at 865.

The question is important not only because of the general principles of certainty in penal legislation, nor only because of the heightened dangers of vagueness in areas of protected speech; it is all the more important because this is a period in our history of great change in the area of political campaign regulation. See *Buckley v. Valeo*, — U.S.—, Nos. 75-436, 75-437, January 30, 1976.

This Court's guidance is necessary to help preserve both the integrity of the political process, and the rights of individuals who must suit their actions to the dictates of campaign legislation. The Constitutionality of 18 U.S.C. §§591 and 610 is an important question which this Court has not decided, but should decide.

III. The Venue Question

The decision below finding venue established in New York is in conflict with this Court's decisions construing the Constitutional venue provision. In *Johnson v. United States*, 323 U.S. 273 (1944), Mr. Justice Frankfurter reviewed the commands of Article 3 §2, clause 3, and the Sixth Amendment and observed:

> Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed If an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it. 323 U.S. at 275-276.

See also *United States v. Anderson*, 328 U.S. 699 (1945), and, more recently, after enactment of 18 U.S.C. 3237 providing for trial in more than one district in certain circumstances, *United States v. Cores*, 356 U.S. 405 (1958), where the Court noted that in the absence of a specific statutory provision the determination of venue must be based upon

> the nature of the crime alleged and the location of the act or acts constituting it. 356 U.S. at 408.

And see *Travis v. United States*, 364 U.S. 631 (1961).

The present case is unusual in that neither aiding and abetting nor conspiracy was charged, but rather *causing*, and it is essential to focus upon Petitioner's conduct and the nature of the alleged offense to determine the venue, since no guilty principal's act supplies it.

The lower court's focus on deposit of checks was misplaced. Under §591 a contribution "includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable." Agreement that AMPI would pay and L&N would receive payment was made outside New York and the offense (if any) was complete long before the checks reached New York.

And so the court's reliance upon *Burton v. United States*, 196 U.S. 283 (1905), with its focus upon deposit of checks was misplaced. More apposite is a subsequent decision involving the same defendant: *Burton v. United States*, 202 U.S. 344, 381-389 (1906). Burton, a Senator, agreed to represent a company in a matter in which the United States had an interest, contrary to a statute forbidding Senators to "receive or agree to receive" compensation for such services. The agreement was effected by mail, the company being in St. Louis, Burton elsewhere. The Court held: "The agreement between the parties was completed at the time of the acceptance of the defendant's offer at St. Louis . . . then the offense was committed, and it was committed at St. Louis. . . ." 202 U.S. at 388.

Finally, if the payment were a "gift" as the court below reasoned, it could have been a "gift" only to the Humphrey campaign and not to L&N, to whom it was merely payment for services rendered; by no stretch of imagination or statutory language can it be said that L&N received

a "gift" from either AMPI or the Humphrey campaign when the checks were deposited in New York. The finding that the payment was a gift is irreconcilable with his ruling that the offense was committed in New York.

The evidence is uncontradicted that Petitioner made an agreement in Minnesota; if he caused L&N to accept them, if he mailed the checks or handed them to an L&N employee, it was in Minnesota and, at the very latest the offense was complete at that point. The offense is manifestly not a continuing one. The provisions of §610 are designed to prevent influence upon a political candidate; here neither the candidate or AMPI was in New York; only L&N's bank account even brought mention of New York into the trial. Therefore whether the offense is viewed as the agreement, the causation, or the receipt of checks the evidence failed to establish that it occurred in New York.

This question, too, is important; it goes to the crux of the Constitutional venue provisions and the opinion below is in derogation of the important considerations underlying those provisions. Petitioner respectfully suggests that this Court should review the two *Burton* opinions and its later decisions, and resolve the uncertainty which now exists and which led to the opinion below.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Dated this 28th day of May, 1976.

APPENDIX

I STATUTES AND RULE INVOLVED:

Tillman Act 1907:

It shall be unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for, or any election by any State legislature of a United States Senator. Every corporation which shall make any contribution in violation of the foregoing provisions shall be fined not more than five thousand dollars; and every officer or director of any corporation who shall consent to any contribution by the corporation in violation of the foregoing provisions shall be fined not more than one thousand dollars, or imprisioned not more than one year, or both. (Jan. 26, 1907, c. 420,34 Stat. 864) (renumbered in Criminal Code Act, March 4, 1909, c. 321 § 83, 35 Stat. 1103) (repealed by Corrupt Practices Act, Feb. 28, 1925, *infra*)

Federal Corrupt Practices Act of 1925.

2 U.S.C. Section 241. Definitions. When used in this Chapter—

(a) The term "election" includes a general or special election, and, in the case of a Resident Commissioner from the Phillippine Islands, an election by the Phillippine Legislature, but does not include a primary election or convention of a political party;

(b) The term "candidate" means an individual whose name is presented at an election for election as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected;

(c) The term "political committee" includes any committee, association, or organization which accepts contributions or makes expenditures for the purposes of influencing or attempting to influence the election of candidates or presidential and vice presidential electors (1) in two or more States, or (2) whether or not in more than one State if such committee, association, or organization (other than a duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association, or organization;

(d. The term "contribution" includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable to make a contribution;

(e) The term "expenditure" includes a payment, distribution, loan, advance deposit, or gift, of money, or any thing of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure;

(f) The term "person" includes an individual, partnership, committee, association, corporation, and any other organization or group of persons;

(g) The term "Clerk" means the Clerk of the House of Representatives of the United States;

(h) The term "Secretary" means the Secretary of the Senate of the United States;

(i) The term "State" includes Territory and possession of the United States. (June 25, 1910, c. 392 §§ 1, 8, 36 Stat. 822*; Aug. 19, 1911, c. 33 § 2, 37 Stat. 26; Aug. 23, 1912, c. 349,37 Stat. 360; Feb. 28, 1925, c. 368, Title III, § 302, 43 Stat. 1070.) (Repealed and superceded Pub. L. 92-225, Title IV, § 405, Feb. 7, 1972, 86 Stat. 20 see 2 U.S.C. § 431, Pub. L. 92-225, Title III, § 301, Feb. 7, 1972, 86 Stat. 11.)

2 U.S.C. §251. Contributions by national banks or other Federal corporations; penalty. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution in connection with any election to any political office, or for any corporation whatever to make a contribution in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or for any candidate political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation which makes any contribution in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation who consents to any contribution by the corporation in violation of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both. (Jan. 26, 1907, c. 420, 34 Stat. 864; Mar. 4, 1909, c. 321 § 83, 35 Stat. 1103; Feb. 28, 1925, c. 368, Title III, § 313, 43 Stat. 1074.) (Repealed and superceded by *Taft Hartley Act, supra,* June 25, 1948, c. 645 § 21, 62 Stat. 862)

Taft-Hartley Act of 1948 as amended; this is the act applicable to this case:

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*", 824" should be added.

18 U.S.C. § 591. Definitions. When used in sections 597, 599, 602, 609 and 610 of this title—

The term "election" includes a general or special election, but does not include a primary election or convention of a political party;

The term "candidate" means an individual whose name is presented for election as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected;

The term "political committee" includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors (1) in two or more States, or (2) whether or not in more than one state if such committee, association, or organization (other than a duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association, or organization;

The term "contribution" includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable;

The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable;

The term "person" or the term "whoever" includes an individual, partnership, committee, association, corporation, and any other organization or group of persons;

The term "State" includes Territory and possession of the United States. June 25, 1948, c. 645, 62 Stat. 719; May 24, 1949, c. 139 § 9, 63 Stat. 90.

18 U.S.C. § 608. Limitations on political contributions and purchases

(a) Whoever, directly or indirectly, makes contributions in an aggregate amount in excess of $5,000 during any calendar year, or in connection with any campaign for nomination or election, to or on behalf of any candidate for an elective Federal office, including the offices of President of the United States and Presidential and Vice Presidential electors, or to or on behalf of any committee or other organization engaged in furthering, advancing, or advocating the nomination or election of any candidate for any such office or the success of any national political party, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

This subsection shall not apply to contributions made to or by a State or local committee or other State or local organization or to similar committees or organizations in the District of Columbia or in any Territory or Possession of the United States.

(b) Whoever purchases or buys any goods, commodities, advertising, or articles of any kind or description, the proceeds of which, or any portion thereof, directly or indirectly inures to the benefit of or for any candidate for an elective Federal office including the offices of President of the United States, and Presidential and Vice Presidential electors or any political committee or other political organization engaged in furthering, advancing, or advocating the nomination or election of any candidate for any such office or the success of any national political party, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

This subsection shall not interfere with the usual and known business, trade, or profession of any candidate.

(c) In all cases of violations of this section by a partnership, committee, association, corporation, or other organization or group of persons, the officers, directors, or managing heads thereof who knowingly and willfully participate in such violation, shall be punished as herein provided.

(d) The term "contribution", as used in this section, shall have the same meaning prescribed by section 591 of this title. June 25, 1948, c. 645, 62 Stat. 723.

18 U.S.C. § 610. Contributions or expenditures by national banks, corporations or labor organizations

It is unlawful for any national bank, or any corporation organized by authority if any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, June 25, 1948, c. 645, 62 Stat. 723; May 24, 1949, c. 139, § 10, 63 Stat. 90; Oct. 31, 1951, c. 655 § 20 (c), 65 Stat. 718.

Federal Election Campaign Act of 1971; this is the statute attached to the indictment:

18 U.S.C. § 610. Contributions or expenditures by national banks, corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to

select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or

any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided*, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

As amended Feb. 7, 1972, Pub. L. 92-225, Title II, § 205.86 Stat. 10.

18 U.S.C. § 591. Definitions

When used in sections 597, 599, 600, 602, 608, 610, and 611 of this title—

(a) "election" means (1) a general, special, primary, or runoff election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election

held for the selection of delegates to a national nominating convention of a political party, (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and (5) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

(b) "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal office, if he has (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States, or Senator or Representative in or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

(e) "contribution" means—

(1) a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with

the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;

(3) a transfer of funds between political committees;

(4) the payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; and

(5) notwithstanding for foregoing meanings of "contribution", the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee;

(f) "expenditure" means—

(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value

(except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

(3) a transfer of funds between political committees;

(g) "person" and "whoever" mean an individual, partnership, committee, association, corporation, or any other organization or group of persons; and

(h) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

As amended Sept. 22, 1970, Pub. L. 91-405, Title II, § 204(d) (4), 84 Stat. 853; Feb. 7, 1972, Pub. L. 92-225, Title II §201, 86 Stat. 8.

Federal Election Campaign Act Amendments of 1974; See Pub. L. 93-443, Title I, §§ 101 (f) (2), 102, 88 Stat. 1268, 1269 for amendments to § 591; Title I, § 101 (a),

(b), 88 Stat. 1263, 1266, for amendments to § 608; Title I, § 101 (e) (1), 88 Stat. 1267, for amendments to § 610.

2 U.S.C. § 455. Period of limitations—Three year period

(a) No person shall be prosecuted, tried, or punished for any violation of subchapter I of this chapter or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, unless the indictment is found or the information is instituted within 3 years after the date of the violation.

Effective date; acts or omissions, legality; pending proceedings

(b) Notwithstanding any other provision of law—

(1) the period of limitations referred to in subsection (a) of this section shall apply with respect to violations referred to in such subsection committed before, on, or after the effective date of this section; and

(2) no criminal proceeding shall be instructed against any person for any act or omission which was a violation of any provision of subchapter I of this chapter, or section 608, 610, 611, or 613 of Title 18, as in effect on December 31, 1974, if such act or omission does not constitute a violation of any such provision, as amended by the Federal Election Campaign Act Amendments of 1974.

Nothing in this subsection shall affect any proceeding pending in any court of the United States on the effective date of this section.

Pub. L. 92-225, Title IV, § 406, as added Pub. L. 93-443, Title III, § 302, Oct. 15, 1974, 88 Stat. 1289.

18 U.S.C. § 2, Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655 § 17b, 65 Stat. 717.

18 U.S.C. § 3237. Offenses begun in one district and completed in another

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed

in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided,* That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

June 25, 1948, c. 645, 62 Stat. 826; Aug. 6, 1958, Pub. L. 85-595, 72 Stat. 512; Nov. 2, 1966, Pub. L. 89- 713, § 2, 80 Stat. 1108.

Federal Rules of Criminal Procedure, Rule 18

PLACE OF PROSECUTION AND TRIAL

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.
As amended Feb. 28, 1966, eff. July 1, 1966.

II OPINIONS BELOW:

UNITED STATES of AMERICA

v.

JACK L. CHESTNUT,

Defendant.

No. 74 Cr. 1191.

United States District Court,
S. D. New York.
April 8, 1975.

Manager of United States Senator's election campaign who was charged with wilfully and knowingly accepting an illegal corporate contribution to the senator's 1970 campaign moved to dismiss indictment against him on grounds that it violated ex post facto clause, failed to state an offense, and that statutes in force in 1970 were unconstitutionally vague. The District Court, Edward Weinfeld, J., held that the indictment returned against defendant in December 1974 did not violate ex post facto clause by charging defendant with offense in 1970 based upon 1972 amendments to campaign contributions statute; that indictment which charged defendant with arranging to have corporation pay Senator's advertising firm $12,000 for one month's services rendered to Senator's campaign was sufficient to charge offense under law of principals where defendant was personally prevented from accepting such contributions; that corporate campaign contributions statute was not unconstitutionally vague; and that corporate campaign statute did not violate First Amendment when examined in light of its legitimate purposes.

Motion denied.

1. Constitutional Law (Key) 200

Fact that citation at end of indictment which was returned in December 1974 charging defendant with violations of corporate campaign statute contained no reference to the official statutes at large or any indication that indictment was grounded upon the 1970 version as opposed to the 1972 amended statute did not establish that indictment violated ex post facto clause since allegations which established that offense took place in 1970 rather than statutory citation governed validity of indictment. 18 U.S.C.A. §§ 2, 591, 610; U.S.C.A. Const. art. 1, § 9, cl. 3; Fed.Rules Crim.Proc. rule 7(c), 18 U.S.C.A.

2. Indictment and Information (Key) 108

The statute on which an indictment is founded must be determined as a matter of law from the facts pleaded therein.

3. Constitutional Law (Key) 200

Fact that indictment described an alleged "indirect payment" in 1970 from a corporation to Senator's campaign which defendant managed did not mean that indictment violated ex post facto clause by using 1972 version of corporate campaign contribution law prohibiting "indirect payments" where allegations spelling out the payment were used to describe details by which defendant allegedly en-

gaged in artifice or subterfuge to conceal receipt of illegal contribution. 18 U.S.C.S. §§ 2, 591, 610; U.S.C.A.Const. art. 1, § 9, cl. 3.

4. Indictment and Information (Key) 108

Fact that copy of 1972 version of statute was attached to press release upon return of indictment in 1974 alleging 1970 violation of corporate campaign statute was immaterial where charges were embraced within statute in force at time of alleged commission. 18 U.S.C.A. §§ 2, 591, 610.

5. Elections (Key) 317

The insertion in corporate campaign statute of definition of the phrase "contribution or expenditure" to supplement definitions of "contribution" and "expenditure" did not make illegal conduct which had prior to 1972 amendments been legal. 18 U.S.C.A. §§ 591, 610.

6. Elections (Key) 317

A corporation's payment to Senator's advertising firm of $12,000 for one month's services to Senator's campaign constituted a "contribution" to Senator's campaign notwithstanding contention that the term "contribution" as defined in statute did not include the term "payment." 18 U.S.C.A. §§ 591, 610.

See publication Words and Phrases for other judicial constructions and definitions.

7. Elections (Key) 317

The substance of a transaction and not its form controls where the transaction constitutes an illegal campaign contribution. 18 U.S.C.A. §§ 2, 591, 610.

8. Elections (Key) 328(1)

Indictment which alleged that United States Senator's campaign manager arranged payment by corporation of $12,000 to Senator's advertising firm in payment of one month's services to Senator's campaign was sufficient to state an offense against campaign manager for causing advertising firm to do that which, if done directly by him, would have constituted acceptance of illegal corporate campaign contribution. 18 U.S.C.A. §§ 2, 591, 610.

9. Criminal Law (Key) 13.1(1)

A criminal statute may be declared void for vagueness if an individual cannot reasonably understand that his contemplated conduct is forbidden.

10. Criminal Law (Key) 13.1(11)

Strict standards of definiteness must be applied to illegal campaign contribution statutes because the free dissemination of ideas may be inhibited thereunder. 18 U.S.C.A. §§ 591, 610; U.S.C.A.Const. Amend. 1.

11. Crininal Law (Key) 13.1(11)

Statutes prohibiting the acceptance of campaign contributions from corporations or unions which contain specific prohibition against receipt or acceptance by any person of union or corporate contributions were not so vague that men of common intelligence must necessarily guess at their meaning. 18 U.S.C.A. §§ 591, 610; U.S.C.A.Const. Amend. 1.

12. Criminal Law (Key) 13.1(11)

Even if the outermost boundaries of the illegal corporate campaign contribution statutes may be imprecise, any such

uncertainty had little relevance to defendant whose alleged conduct fell squarely within the hard core of the statutes' proscriptions. 18 U.S.C.A. §§ 591, 610; U.S.C.A.Const. Amend. 1.

13. Constitutional Law (Key) 42.2(1)

Where First Amendment values are involved, the traditional rule of constitutional adjudication that one to whom a statute may constitutionally be applied will not be heard to challenge such statute on ground that it may be unconstitutional as applied to another does not apply. U.S.C.A. Const. Amend. 1.

14. Criminal Law (Key) 13(1)

Where conduct and not merely speech is involved, a defendant may not challenge the facial validity of the statute unless the statute is "substantially overbroad." U.S.C.A. Const. Amend. 1.

15. Constitutional Law (Key) 90.1(1, 7)
Elections (Key) 311

In determining the constitutionality of illegal corporate campaign contribution statutes, the First Amendment rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards

is particularly acute in the labor field where labor union membership can be condition of employment. 18 U.S.C.A. §§ 591, 610; U.S.C.A.Const. Amend. 1.

16. Constitutional Law (Key) 90.11(1, 7)
Elections (Key) 311

The campaign contribution statutes which prohibit acceptance of contributions from corporations or labor unions did not violate First Amendment rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. 18 U.S.C.A. §§ 591, 610; U.S.C.A.Const. Amend. 1.

Paul J. Curran, U. S. Atty., for the Southern District of New York, New York City, for United States of America; Eugene F. Bannigan, Robert Gold, Asst. U. S. Attys., of counsel.

Douglas W. Thomson, Jack S. Nordby, Thomson, Wylde, Nordby & Friedberg, John A. Cochrane, Cochrane & Bresnahan, Saint Paul, Minn., for Defendant.

OPINION

EDWARD WEINFELD, District Judge.

The defendant, Jack L. Chestnut, is under indictment upon a charge that he willfully and knowingly accepted and received and did cause another to accept and receive, a corporate contribution to Hubert H. Humphrey's 1970 senatorial campaign, in violation of 18 U.S.C., sections 610 and 2. He now moves to dismiss the indictment on

three grounds: (1) it violates the ex post facto clause of the United States Constitution;[1] (2) it fails to state an offense; and (3) the statutes in force in 1970 at the time of the alleged offense, 18 U.S.C., sections 610 and 591, were unconstitutional in that they were vague, overbroad and in violation of the First Amendment.

THE INDICTMENT

The indictment charges that from February 1, 1970 to November 3, 1970, within which period Hubert H. Humphrey was a candidate for the nomination of the Democratic-Farmer-Labor party for the office of United States Senator from the State of Minnesota. and later its candidate for that office, the defendant was Humphrey's campaign manager; that from on or about March 1, 1970 to on or about June 25, 1970 the defendant willfully and knowingly accepted and received a contribution from a corporation, American Milk Producers, Inc. ("AMPI"), on behalf of the Humphrey campaign; that this was accomplished by the defendant's arranging with AMPI's corporate officials that AMPI would pay the advertising firm of Lennon & Newell, Inc. ("L & N") for one month's services rendered by L & N to the Humphrey campaign; that the defendant arranged with an official of L & N that it would prepare invoices addressed to AMPI for one month's services rendered to the Humphrey campaign; that the defendant forwarded and caused to be forwarded these invoices to AMPI and further that he forwarded and caused to be forwarded to L & N two checks drawn on corporate accounts of AMPI, each payable to L & N in the sum of $6,000, dated June 1 and June 11, 1970, respectively.

[1]Art. I, § 9, cl. 3.

Against the background of the indictment's charges we consider each branch of his motion.

I

That the indictment violates the ex post facto clause of the United States Constitution.

Defendant's claim is that the indictment is based upon a statute not in existence at the time the acts charged in the indictment occurred. At that time, the year 1970, the statute read:

> "It is unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with any election at which . . . a Senator . . . [is] to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for . . . [such office], or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section."

Thus, under the foregoing statute, it was unlawful for (1) a corporation to make "a contribution or expenditure," and (2) any person to accept or receive a "contribution." The 1970 version of section 610 contained no definition of "contribution" or "expenditure." These were defined in section 591 of Title 18, as follows:

> "The term 'contribution' includes a gift, subscription, loan, advance, or deposit, of money, or anything of value . . . ."
>
> "The term 'expenditure' includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value . . . ."

The defendant, in support of his argument, observes that "expenditure" is the broader term since it adds "payment" and "distribution" to the words defining "contribution."

In 1972 section 610 was amended by, inter alia, the inclusion of a definition of "contribution or expenditure":

> "As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . ."[2]

At the same time section 591 was also amended as to the definition of the terms "contribution" and "expenditure."[3] Here the defendant notes that under the amendment "expenditure" still remained the broader term, retaining the words "payment" and "distribution" and adding the word "purchase," which is not included in the definition of "contribution." He acknowledges that the issues raised by his argument are "technical and difficult."

[*1, 2*] The indictment, as is customary, refers, at the end of the charging allegations to the statute as follows: "Title 18, United States Code, sections 610 and 2." The defendant first argues that since this citation of section 610 at the end of the indictment, which was returned in December 1974, contains no reference to the official statutes at large or any indication that the indictment was grounded upon the 1970 version, therefore it was returned by the grand jury under the amended 1972 statute, even though the alleged violation occurred in 1970. However, this argument disregards the allegations as pleaded in the

[2]As amended Feb. 7, 1972, Pub.L. 92-225, Title II, § 205, 86 Stat. 10.

[3]86 Stat. 8.

indictment. It charges simply that in 1970 during the time Humphrey was a senatorial candidate the defendant willfully and knowingly "did accept and receive . . . a corporate contribution from AMPI on behalf of the aforesaid Humphrey campaign . . . ." The allegations of the indictment, not the statutory citation[4] determines its validity.[5] As this court stated on another occasion,[6] the statute on which an indictment is founded must be determined as a matter of law[7] from the facts pleaded therein.

[3] The defendant advances other contentions to support his claim that in obtaining the indictment the prosecution and the grand jury proceeded under the statute now in effect and not as it existed in 1970. Here, he argues that the payment described in the indictment is an "indirect payment" from AMPI to the Humphrey campaign, and

[4]The defendant's claim that there was error in the citation because it did not specifically indicate a reference to the 1970 version is frivolous. Even if the court agreed that it was error not to cite the specific 1970 version of section 610, Rule 7(c) of the Federal Rules of Criminal Procedure provides that error in the citation shall not be a ground for dismissal of the indictment if the error did not mislead the defendant to his prejudice. The defendant is aware that the prosecution is grounded on section 610, but alleges that it is not clear under which version of the statute the indictment is brought. Since the disposition of this motion resolves the issue in advance of trial, clearly he is not prejudiced. United States v. Calabro, 467 F.2d 973, 981 (2d Cir. 1972), cert. denied, 410 U.S. 926, 93 S.Ct. 1357, 35 L.Ed.2d 587 (1973); United States v. Galgano, 281 F.2d 908, 910-11 (2d Cir. 1960) cert. denied sub nom., Carminati v. United States, 366 U.S. 960, 81 S.Ct. 1916, 6 L.Ed.2d 1253 and Galgano v. United States, 366 U.S. 967, 81 S.Ct. 1929, 6 L.Ed.2d 1257 (1961).

[5]United States v. Bethany, 489 F.2d 91, 93 (5th Cir. 1974).

[6]United States v. McKenney, 181 F.Supp. 143, 146 (S.D.N.Y. 1959), aff'd sub. nom., United States v. Galgano, 281 F.2d 908 (2d Cir. 1960), cert. denied sub nom., Carminati v. United States, 366 U.S. 960, 81 S.Ct. 1916, 6 L.Ed.2d 1253 and Galgano v. United States, 366 U.S. 967, 81 S.Ct. 1929, 6 L.Ed.2d 1257 (1961).

[7]United States v. Nixon, 235 U.S. 231, 235, 35 S.Ct. 49, 59 L.Ed. 207 (1914); United States v. Meyer, 266 F.2d 747, 753 (5th Cir.), cert. denied, 361 U.S. 875, 80 S.Ct. 138, 4 L.Ed.2d 113 (1959).

that only the 1972 version of section 610 contains any reference to an "indirect payment"; further, that the indictment refers to payment for "services" and the latter word also appears only in the 1972 amendment to section 610. Consequently, it is contended that necessarily the indictment was returned under the 1972 amendment. This contention is lacking in substance. The allegations which spell out the payment by AMPI to L & N for the services it rendered to the Humphrey campaign merely describe the details whereby it is charged the defendant engaged in artifice or subterfuge to conceal the receipt of the contribution. Instead of accepting and receiving the contribution directly from AMPI, the defendant allegedly conceived the method described whereby he received a contribution to the Humphrey campaign by arranging for AMPI to satisfy a debt owed by the Humphrey campaign to its advertising agency.

[4] The defendant's further contention is equally without substance. He stresses that the copy of the indictment attached to a press release issued by the prosecution contained a copy of the 1972 version of section 610. A press release does not validate or invalidate an indictment. As already noted, its validity is determined by its pleaded allegations. It is therefore immaterial what statute was attached to a press release or what statute was in the prosecutor's mind when he obtained the indictment if the charges are embraced within a statute in force at the time of the alleged commission of the offense.[8] Moreover, there is not the slightest basis for indulging in a presumption that the

[8]United States v. Hutcheson, 312 U.S. 219, 229, 61 S.Ct. 463, 85 L.Ed. 788 (1941); Williams v. United States, 168 U.S. 382, 389, 18 S.Ct. 92, 42 L.Ed. 509 (1897); Paz Morales v. United States, 278 F.2d 598 (1st Cir. 1960); Pettway v. United States, 216 F.2d 106 (6th Cir. 1954); United States v. Kolodny, 149 F.2d 210 (2d Cir. 1945).

prosecutor sought an indictment from the grand jury based upon a statute not in existence at the time the acts alleged therein occurred.

[5] Finally, the defendant's assertion that the events described in the indictment could only be illegal under the present amended version of section 610 rather than the 1970 version of the statute is conclusively refuted by the Supreme Court's holding in Pipefitters Local Union No. 562 v. United States.[9] There, the Court held, with one exception not relevant in this discussion, that the Federal Election Campaign Act's amendments to section 610 "merely codifies prior law."[10] At the time the amendments were enacted, there was substantial agreement in Congress that the effect of the amendment to section 610 was a "mere codification and clarification" "to spell out in more detail what a labor union or corporation can or cannot do in connection with a federal election."[11] Thus defendant's claim that the insertion in section 610 of the definition of the phrase "contribution or expenditure" to supplement the definitions of "contribution" and "expenditure" in section 591[12] made conduct illegal which was theretofore legal is without merit.

The motion to dismiss the indictment on the ground that it violatees the ex post facto clause of the Constitution is denied.

[9]407 U.S. 385, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972).
[10]407 U.S. at 399, 92 S.Ct. 2247.
[11]407 U.S. at 410-11, 92 S.Ct. at 2262.
[12]Itself amended in 1972, 86 Stat. 8.

II

That the indictment fails to state an offense under section 610.

As already noted, the statute prohibits corporations from making "a contribution or expenditure," but as to any person it makes it a crime only "to accept or receive" a prohibited "contribution." The defendant's challenge rests upon this distinction. He contends that while the indictment charges the acceptance and receipt of a campaign "contribution," the payment described is in fact an "expenditure" and therefore its acceptance and receipt was not unlawful under the statute.

[6] As the court understands the defendant's argument, essentially it is that AMPI made a $12,000 "payment" to L & N for their services, and as such this was an "expenditure" by AMPI as that term is defined under the statute, not a "contribution." The argument rests upon the definitions of "contribution" and "expenditure" contained in the 1970 version of section 591. The defendant stresses that "contribution" as there defined does not include a "payment," whereas "expenditure" does. Since in his view the payment made to L & N was an "expenditure" by AMPI, no offense is stated. This rather strained argument, whereby the defendant concludes that the $12,000 payment was an expenditure, not a contribution, by AMPI, disregards the fact that the term "contribution" is defined under the 1970 version to include a "gift . . . of money, or anything of value . . . ." Clearly, picking up another's obligation—here a Humphrey campaign debt to L & N—

is a gift of money, in short, a contribution to the Humphrey campaign.

The legislative history of section 610 further demonstrates that the defendant's contention is without merit. Section 610 was amended in 1947 by the Taft-Hartley Act[13] to strengthen the prohibition against corporate and union "contributions" by extending the statute's reach to prohibit "expenditures" in a continuing effort to assure the integrity of the federal electoral process and to eliminate corruptive influences upon those seeking and holding public office. While the statute clearly forbade union or corporate gifts directly to a candidate or his campaign organization, there was some doubt that its prohibitions went further.[14] Congressional investigations into the 1944 and 1946 elections established that the force of the then existing statute was blunted and evaded when unions participated in federal elections by making "expenditures" as distinguished from "contributions" to candidates or their committees.[15] The investigations revealed that unions had spent large sums of money to influence the outcome of these campaigns in opposing or supporting candidates by direct communication to the public through the distribution of pamphlets and campaign literature or the sponsoring of partisan radio broadcasts.[16] The Supreme Court emphasized in the *Auto*

[13]61 Stat. 159.
[14]*See* United States v. Auto Workers, 352 U.S. 567, 579-80, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957); United States v. C.I.O., 335 U.S. 106, 115, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948).
[15]S.Rep.No.101, 79th Cong., 1st Sess. 23.
[16]United States v. Auto Workers, 352 U.S. 567, 580-89, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957).

Workers case that the evil which Congress sought to eliminate by the 1947 addition of the ban on "expenditures" to the prohibition of "contributions" was "the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party."[17] The Court there held that an offense was stated under an indictment which charged that a union "used union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections."[18] Thus the word "expenditure" refers to the use by a corporation or a union of its funds to promote its own political views by endorsing or opposing candidates for federal office. Such "expenditures" are made to meet the obligations incurred by the union or corporation. By contrast, a "contribution" in the 1970 version of the statute refers, inter alia, to a "gift . . . of money, or anything of value,"[19] typically made to a candidate or his campaign organization to help the candidate carry his message to the public.

[7] Here the indictment specifically charges that the defendant accepted and received and caused L & N to accept and receive money from AMPI for L & N's bill for services rendered to the Humphrey campaign. In light of the statute's history and the Supreme Court's analysis and interpretation of it, this clearly constitutes the receipt of a "contribution." Though the indictment charges that the defendant caused AMPI, upon his instructions, to make the checks payable to L & N and that he then forwarded or

[17] *Id.* at 589, 77 S.Ct. at 540.
[18] *Id.* at 585, 77 S.Ct. at 538.
[19] 18 U.S.C. § 591.

caused to be forwarded the checks to L & N, this does not change the character of the transaction. It is the substance of the transaction and not its form that controls. The defendant does not suggest that AMPI itself owed L & N any money. The Humphrey campaign, not AMPI, incurred the debt to L & N, and the $12,000 was paid to the latter to discharge the Humphrey campaign's obligation to the advertising agency. No amount of rhetoric can obfuscate the substance of this simple charge that the defendant received on behalf of the Humphrey campaign a contribution, a "gift . . . of money" from AMPI, by arranging for the payment of the debt owed by the Humphrey campaign to L & N. The indictment clearly charges an offense under the 1970 version of section 610 within the definition of a "contribution" in the 1970 version of section 591.

[8] Further, under the allegations of the indictment that the defendant caused L & N to accept and receive the contribution from AMPI, the defendant is charged under section 2 of Title 18. If the defendant himself accepted and received the money from AMPI in checks payable to him or to the Humphrey campaign, he would have accepted and received a contribution in violation of section 610. Section 2 provides that one who willfully causes another to do that which, if directly done by him, would violate the law is punishable as a principal. Thus, the indictment states an offense under sections 610 and 2 in that it charges the defendant with causing Lennen & Newell to accept and receive a contribution to the Humphrey campaign from AMPI.

III

That Sections 610 and 591 are unconstitutional.

Defendant's third argument is that the applicable versions of section 610 and section 591 are unconstitutional for two reasons: (1) because the language of the statutes is so vague that men of ordinary intelligence must guess as to their meaning, and (2) because the statutes' overly broad prohibitions have an impermissible chilling effect on First Amendment rights.

A.

[9,10] A criminal statute may be declared void for vagueness where a court concludes that an individual could not reasonably understand that his contemplated conduct is forbidden.[20] As the Supreme Court has stated:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[21]

Entirely apart from consideration of a claim of due process violation based upon an alleged statutory infirmity of

[20]United States v. National Dairy Products Corp., 372 U.S. 29, 32-33, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963).
[21]United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954).

vagueness, a careful examination of a statute is required where it regulates conduct arguably affected with First Amendment interests. Stricter standards of definiteness apply here because when a man is required to act at his peril in this area, the free dissemination of ideas may be inhibited.[22]

[11, 12] The 1970 versions of sections 610 and 591 meet the applicable standards of definiteness under due process and First Amendment requirements. Indeed, defendant has offered no support for his claim that the statutes did not give a fair warning as to the criminality of his alleged conduct. All that is required is that the language employed convey a reasonable degree of certainty adequate to inform him of what is or is not prohibited.[23] It borders on the frivolous to suggest that the clearly defined specific prohibition against the receipt or acceptance by any person of union or corporate contributions is so vague that "men of common intelligence must necessarily guess at its meaning."[24] The statutes do not leave judges and jurors free to decide what is permitted and what is prohibited in each case.[25] Their terms are sufficiently clear

[22]Cramp v. Board of Public Instruction, 368 U.S. 278, 287, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); Smith v. California, 361 U.S. 147, 151, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); Winters v. People of State of New York, 333 U.S. 507, 516-20, 68 S.Ct. 665, 92 L.Ed. 840 (1948).
[23]United States v. Pope, 189 F.Supp. 12, 21 (S.D.N.Y. 1960).
[24]Connelly v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).
[25]*See* Giaccio v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

and definite to meet constitutional scrutiny for vagueness.[26] Moreover, as the Supreme Court has recently stated, "even if the outermost boundaries of [the statute] may be imprecise, any such uncertainty has little relevance here, where [defendant's] conduct falls squarely within the 'hard core' of the statute's proscriptions. . . ."[27]

B.

Defendant also argues that the applicable versions of sections 610 and 591 unconstitutionally impair the First Amendment rights of free speech, free press, and the right to assemble and petition government.

[13, 14] Defendant acknowledges that the indictment on its face does not allege an act of unlawful speech or assembly by him; nonetheless he asserts he may challenge the statute if on its face if purports to punish any citizen's protected speech or conduct. He relies upon the cases which hold that although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the particular conduct charges against the defendant, he is per-

[26]United States v. Pipefitters Local Union No. 562, 434 F.2d 1116, 1123-24 (8th Cir. 1970), adhered to in en banc decision, 434 F.2d 1127, rev'd and vacated on other grounds, 407 U.S. 385, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972). *See* Broadrick v. Oklahoma, 413 U.S. 601, 607-08, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 578-79, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

[27]Broadrick v. Oklahoma, 413 U.S. 601, 608, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830 (1973).

[28]Two courts of appeals have upheld the constitutionality of § 610. United States v. Boyle, 157 U.S.App.D.C. 166, 482 F.2d 755, 763-64, cert. denied, 414 U.S. 1076, 94 S.Ct. 593, 38 L.Ed.2d 483 (1973); United States v. Pipefitters Local Union No. 562, 434 F.2d 1116 (8th Cir. 1970), adhered to in en banc decision, 434 F.2d 1127, rev'd and vacated on other grounds, 407 U.S. 385, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972).

mitted to raise its vagueness or unconstitutional overbreadth as applied to others, and if the law is found deficient in one of these respects, it may not be applied to him either, unless a limiting construction is placed on the statute.[29] Because of the important values protected by the First Amendment, the traditional rule of constitutional adjudication that one to whom a statute may constitutionally be applied will not be heard to challenge the statute on the ground that it may be applied unconstitutionally to another[30] is not invoked. Thus the usual rules of standing are relaxed in the First Amendment area and accordingly a defendant may challenge a statute not because his own First Amendment rights are infringed upon but because of the concern that the statute's existence may cause others not to engage in constitutionally protected expression.[31] However, the standing requirement in the First Amendment area has been further particularized by the Supreme Court in Broadrick v. Oklahoma[32] so that especially where conduct and not merely speech is involved,

[29]Lewis v. New Orleans, 415 U.S. 130, 133-34, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974); Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). *See also* Dombrowski v. Pfister, 380 U.S. 479, 491-92, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

[30]Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513, 57 S.Ct. 868, 81 L.Ed. 1245 (1937); United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930); Hatch v. Reardon, 204 U.S. 152, 160-61, 27 S.Ct. 188, 51 L.Ed. 415 (1907); Supervisors v. Stanley, 105 U.S. 305, 311-15, 26 L.Ed. 1044 (1882); Austin v. The Aldermen, 7 Wall. 694, 698-99, 19 L.Ed. 224 (1869).

[31]Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1972).

[32]413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1972).

unless the statute is "substantially overbroad," a defendent may not challenge whatever overbreadth may exist. In these cases where the overbreadth is not "substantial . . . judged in relation to the statute's plainly legitimate sweep," the Court has decided that it will not entertain attacks on the facial validity of the statute but will deal with it on a case by case basis.[33] In light of *Broadrick*, whether the defendant has standing to raise a First Amendment challenge to sections 610 and 591 is not altogether free from doubt. However, to set the matter at rest, the court assumes that he has satisfied the standing requirement and proceeds to address the issues he raises.

Section 610, which grew out of a long series of congressional efforts dating back to 1907,[34] has two purposes. First, Congress sought "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital."[35] Second, Congress sought to prevent corporate and union officials from using corporate or general union funds for political purposes without the consent of stockholders or union members. Collateral to this objective was the protection of minority interests from overbear-

[33]413 U.S. 615-16, 93 S.Ct. at 2918. Whether this represents a reversal or just a clarification of Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), on which defendant relies, remains to be seen. *Compare* the *Broadrick* majority, 413 U.S. at 616 n. 14, 93 S.Ct. 2908 *with* Mr. Justice Brennan's dissent, 413 U.S. at 622, 93 S.Ct. 2908. *See* "Overbreadth Review and the Burger Court," 49 N.Y. U.L.R. 532 (1974).

[34]United States v. Auto Workers, 352 U.S. 567, 570-75, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957).

[35]United States v. Auto Workers, 352 U.S. 567, 585, 77 S.Ct. 529, 538, 1 L.Ed.2d 563 (1957). *See* Pipefitters Local No. 562 v. United States, 407 U.S. 385, 415-16, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972); United States v. C. I. O., 335 U.S. 106, 113, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948).

ing by union leadership or corporate officials, and in the case of unions, to safeguard employees who may decline to contribute to political funds from loss of jobs, union membership or reprisal by union officials.[36]

[15] Union officials, members, corporate officers and stockholders are not barred by section 610 from participating in federal elections. Each is free to individually use his financial resources to the extent otherwise permitted by law. The statutory prohibition is only on funds derived from corporate treasuries and general union funds. In deciding the constitutionality of these prohibitions, the First Amendment rights of corporations and labor unions[37] must be weighed[38] against the substantial governmental interests[39] in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with different political views, and in protecting individuals who may refuse to contribute to cam-

[36]Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 413-14, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972); United States v. Auto Workers, 352 U.S. 567, 582, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957); United States v. C. I. O., 335 U.S. 106, 113, 115, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948); Ash v. Cort, 496 F.2d 416, 422 (3d Cir. 1974), cert. granted, 419 U.S. 992, 95 S.Ct. 302, 42 L.Ed.2d 264 (1975).

[37]United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); NAACP v. Button, 371 U.S. 415, 428, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Grosjean v. American Press Co., 297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

[38]Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Konigsberg v. State Bar of California, 366 U.S. 36, 50-51, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).

[39]*See* Broadrick v. Oklahoma, 413 U.S. 601, 606, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 557-67, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

paign funds against reprisals. The need for these safeguards is particularly acute in the labor field where union membership can be a condition of employment.[40]

The right of free association and the right to participate in political elections is not without its limits.[41] As the Supreme Court has stated, the management, financing and conduct of political campaigns are subject to certain forms of governmental regulation. Thus, for example, the Court has held that "plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited.[42] So too, all fifty states restrict the political activities of their employees.[43]

[16] Given the government's legitimate interest in the purposes of section 610, the question is whether the government has chosen the "least drastic means" of protecting these interests or whether it has enacted overly broad prohibitions that unnecessarily impinge upon First Amend-

[40]*See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 414, 92 S.Ct. 2247, 33 L.E.2d 11 (1972); International Ass'n of Machinists v. Street, 367 U.S. 740, 776-77, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (Douglas, J. concurring.)

[41]Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 567, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); Rosario v. Rockefeller, 410 U.S. 752, 760-62, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). Dunn v. Bumstein, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Bullock v. Carter, 405 U.S. 134, 140-41, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); Jenness v. Forston, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); Williams v. Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). *See also* Kusper v. Pontikes, 414 U.S. 51, 56-61, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973).

[42]Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 567, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). *See* "The Supreme Court, 1972 Term," 87 HarvL.Rev. 141-49 (1973).

[43]Civil Service Comm'n v. Letter Carriers, 413 U.S. at 563, 93 S.Ct. 2880; Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973).

ment rights.[44] Section 610 and its definitional counterpart section 591, in their 1970 form, meet this "least drastic means test." As authoritatively construed by the Supreme Court, the statute only prohibits contributions or expenditures from certain sources. For example, the statute prohibits only union contributions from monies derived from compulsory union dues and assessments. A union may establish a political organization for the receipt of voluntary contributions for union members.[45] Similarly, in United States v. C. I. O.,[46] the Supreme Court held that the statute does not prevent unions or corporation from publishing a regular periodical for union members, shareholders or customers that may contain political commentary. As the indictment in the case did not charge the defendant union with "circulating free copies to nonsubscribers, nonpurchasers, or among citizens not entitled to receive copies of 'The CIO News,' as members of the union," it did not state an offense under the statutes.[47] Thus the statutes has been construed in a careful fashion to minimize its restrictive impact.

Defendant has presented no less restrictive alternative scheme of regulation that would protect the integrity of elections and the interests of minority union members and corporate shareholders. Given these legitimate governmental concerns, the statute is not overbroad in its scope. De-

[44]Kusper v. Pontikes, 414 U.S. 51, 59, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973); Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed. 2d 231 (1960).

[45]Pipefitters Local Union No. 562 v. United States, 407 U.S. 401, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972).

[46]335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948).

[47]335 U.S. at 111, 68 S.Ct. at 1352.

fendant's attack on the facial validity of section 610 must therefore fail.[48] This conclusion is reinforced by the Supreme Court's holding that at least where conduct and not just speech is regulated by a statute, to declare the statute invalid on its face the Court must find that the overbreadth is not only real, but substantial as well when examined in relation to its legitimate purposes.[49]

Defendant's motion is denied in all respects. The case will proceed to trial on May 5, 1975.

UNITED STATES OF AMERICA,

vs.

JACK L. CHESTNUT, Defendant,

No. 74 Cr. 1191

United States District Court,
S. D. New York.

June 25, 1975

A jury found defendant guilty of knowingly causing another to accept or receive an illegal corporate contribu-

[48]United States v. Boyle, 157 U.S.App.D.C. 166, 482 F.2d 763-64, cert. denied, 414 U.S. 1076, 94 S.Ct. 593, 38 L.Ed.2d 483 (1973); United States v. Pipefitters Local Union No. 562, 434 F.2d 1116 (8th Cir. 1970), adhered to in en banc decision, 434 F.2d 1127, rev'd and vacated on other grounds, 407 U.S. 385, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972). *But see* "The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures," 42 U.Chi.L.Rev. 148 (1974).

[49]Broadrick v. Oklahoma, 413 U.S. 601, 615, 618, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). *See* "The Supreme Court, 1972 Term," 87 Harv. L.Rev. 149-153 (1973).

tion to a senatorial campaign. On the defendant's motion for judgment of acquittal, the District Court, Edward Weinfeld, J., held that the evidence was sufficient to sustain the conviction; that where the recipient deposited the check for the illegal contribution in its bank account in the Southern District of New York, venue was proper in that district, even though all of defendant's conduct in causing the acceptance or receipt of the check was performed by him in Minnesota; and that proof of similar acts was properly admitted.

Motions denied.

1. Criminal Law (Key) 753.2 (6)

Upon motion for judgment of acquittal, trial judge must determine whether upon evidence, giving full play to jury's right to determine credibility, weigh evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

2. Criminal Law (Key) 977(1)

On motion for acquittal after jury verdict of guilty, court must consider evidence in view most favorable to Government. Fed. Rules Crim. Proc. rule 29, 18 U.S.C.A.

3. Elections (Key) 329

Evidence was sufficient to sustain conviction of causing another to accept or receive illegal corporate campaign contribution. 18 U.S.C.A. § 610.

4. Crimianl Law (Key) 107

Sixth Amendment does not provide defendant with constitutional right to trial in his home district. U.S.C.A. Const. Amend. 6.

5. Criminal Law (Key) 108(1)

In determining proper venue, court must determine place of crime after analysis of nature of alleged offense. U.S.C.A. Const. Amend. 6.

6. Criminal Law (Key) 108(1)

Where statute makes it illegal to receive money under certain circumstances and recipient is given a check, venue is proper where the check is deposited and proceeds credited to recipient's account.

7. Criminal Law (Key) 113

In prosecution for knowingly causing another to accept or recive an illegal corporate campaign contribution, venue was proper in Southern District of New York, where recipient of check for illegal contribution deposited check in bank in that district, notwithstanding contention that venue was improper in that district because all defendant's conduct in causing acceptance or receipt of contribution was performed by him in Minnesota. 18 U.S.C.A. § 610; U.S.C.A. Const. Amend. 6.

8. Criminal Law (Key) 108(1)

Generally, where crime charged is failure to do a legally required act, place fixed for its performance, not place where defendant remained, fixes situs of crime for venue purposes.

9. Criminal Law (Key) 110

Accessory may be tried in district where principal committed crime even though accessory never entered district.

10. Criminal Law (Key) 113

In prosecutions for making false statements in matter within jurisdiction of federal agency, venue is improper in district where affidavit was written and mailed, but lies instead where affidavit was required to be filed or where agency decision in reliance thereon takes place.

11. Criminal Law (Key) 370, 371(1)

In prosecution for knowingly causing another to accept or receive illegal corporate campaign contribution, proof of similar acts on defendant's part in accepting three other contributions was admissible as tending to show pattern of conduct on issues of knowledge and intent at time of events charged in indictment. 18 U.S.C.A. § 610.

Paul J. Curran, U. S. Atty., S. D. N. Y., New York City, for the United States; Eugene F. Bannigan, Robert Gold, Asst. U. S. Attys. of counsel.

Thomson, Wylde, Nordby & Friedberg and Cochrane & Bresnahan, St. Paul, Minn., for defendant; Douglas W. Thomson, Jack S. Nordby, John A. Cochrane, St. Paul, Minn., of counsel.

OPINION

EDWARD WEINFELD, District Judge.

The defendant, Jack L. Chestnut, the campaign manager for Senator Hubert H. Humphrey's 1970 campaign for the office of United States Senator from Minnesota, was convicted after a jury trial of willfully violating 18 U.S.C., sections 610 and 2. The charge was that the defendant

caused Lennen & Newell, Inc., a New York advertising agency employed by the Humphrey campaign, to accept or receive an illegal contribution to the Humphrey campaign from Associated Milk Producers, Inc. ("AMPI") a corporation.

The defendant now moves pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal upon various grounds, including that the evidence is insufficient to sustain the conviction, lack of venue in this district, errors in the admission of evidence, and prejudicial instructions to the jury. Other grounds advanced for the judgment of acquittal were previously argued in a pretrial motion for dismissal of the indictment. As to these, the court adheres to its previous rulings, the bases for which are fully explicated in its opinion.[1]

[1] The first challenge to the guilty verdict is that the evidence failed to establish willfulness and consequently a verdict of not guilty is required as a matter of law. The current rule in this circuit is that upon a motion

[1] *United States v. Chestnut*, 394 F.Supp. 581 (S.D.N.Y. 1975). The court held, *inter alia*, that the acts charged in the indictment constitute a "contribution" as that term was defined in the 1970 version of § 591 of Title 18 and thus the indictment stated an offense under §§ 610 and 2. The government's evidence at trial was consistent with the allegations of the indictment. There was no need to reopen the pretrial motion as to whether the indictment charged an offense under § 610, which only prohibits the receipt or acceptance of an illegal "contribution," not an "expenditure." Thus, contrary to defendant's claim, there was not occasion to instruct the jury on the distinction between a "contribution" and an "expenditure" as those terms were used in the 1970 version of §§ 591 and 610, any more than a court should charge the jury on a lesser included offense, duress or entrapment where the evidence does not warrant it. *United States v. Marin*, 513 F.2d 974 (2d Cir. 1975); *United States v. Carroll*, 510 F.2d 507 (2d Cir. 1975); *United States v. Marcey*, 142 U.S. App.D.C. 253, 440 F.2d 281, 285 n. 20 (1971). There was no evidence presented at the trial that raised a factual question as to whether or not the transfer of AMPI funds constituted a contribution. It is clear that AMPI made a contribution to the Humphrey campaign.

for a judgment of acquittal the trial judge must determine whether upon the evidence, giving full play to the jury's right to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.[2]

[2, 3] Considering the evidence in the view most favorable to the government on this motion, as the court must,[3] the court readily finds that "a reasonable mind might fairly conclude" that the defendant willfully violated section 610 beyond a reasonable doubt—that the defendant knew he was causing another to accept or receive an illegal corporate contribution.[4]

Willfulness rarely can be established by direct evidence; usually it is determined by circumstantial evidence, an overall consideration of all the facts and circumstances and the reasonable inferences to be drawn therefrom.

The hard thrust of the defense was that the defendant believed that the contribution came from a fund associated with AMPI, composed of voluntary donations from its

[2] *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), overruling the prior "fair preponderance" test articulated by Judge Learned Hand in *United States v. Feinberg*, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726, 64 S.Ct. 943, 88 L.Ed. 1562 (1944). *See also United States v. DeGarces*, 518 F.2d 1156 (2d Cir. 1975); *United States v. Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States v. Carneglia*, 468 F.2d 1084, 1087 (2d Cir.), *cert. denied sub. nom. Inzerillo v. United States*, 410 U.S. 945, 93 S.Ct. 1391, 35 L.Ed.2d 611 (1973).

[3] *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Freeman*, 498 F.2d 569 (2d Cir. 1974); *United States v. McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States v. D'Avanzo*, 443 F.2d 1224, 1225 (2d Cir.), *cert. denied*, 404 U.S. 850, 92 S.Ct. 86, 30 L.Ed.2d 89 (1970); *United States v. Kahaner*, 317 F. 2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835, 84 S.Ct. 62, 11 L.Ed.2d 65 (1963).

[4] *See United States v. Pipefitters Local Union*, 434 F.2d 1116, 1124-25 (8th Cir. 1970), *rev'd on other grounds*, 407 U.S. 385, 400 n. 11, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972).

members, which legally could make contributions to political campaigns.[5] However, the evidence established that the contribution came from AMPI's general corporate funds and that it was received in an indirect manner devised by the defendant. It was the defendant who directed both Lennen & Newell, Inc. and Bob Lilly, assistant to the general manager of AMPI, to carry out the procedures whereby the advertising agency, which had rendered services to the Humphrey campaign, not to AMPI, would prepare invoices to be made out to AMPI and for AMPI to pay those invoices. It was the defendant who instructed Lilly not to pay the initial invoices because they were not in proper form, but to await corrected bills. It was the defendant who sent a letter to Lilly to have AMPI pay the enclosed four corrected invoices each in the sum of $3,000, instructing him to forward checks made payable to Lennen & Newell to him, the defendant, at his office in Minneapolis, Minnesota. Thereafter, Lilly, pursuant to these instructions, forwarded to the defendant in Minneapolis two $6,000 AMPI checks drawn on a corporate account and payable to Lennen & Newell, Inc. The checks were thereafter deposited by Lennen & Newell in its bank account in this city at Bankers Trust Company. The checks upon their face in two places in bold letters indicated they were corporate checks drawn on a corporate bank account.

The defendant contends that in the absence of direct evidence he saw or would in due course have seen the crucial checks, there was no basis upon which a reasonable mind might fairly conclude beyond a reasonable doubt that he knew that AMPI was using its general corporate funds and thus making an illegal corporate contribution,

[5]*Pipefitters Local Union v. United States*, 407 U.S. 385, 409, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972).

rather than using funds derived from AMPI's voluntary political affiliate, which could make a legal contribution to the campaign. The short answer to this contention is that the defendant's acts and conduct relating to the contribution come within the classic statement by the Supreme Court of circumstances under which willfulness may be inferred, including the "handling of one's affairs to avoid making the records usual in [the] transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."[6] Usually a contributor to a political campaign sends his contribution directly to the campaign committee and normally the committee makes direct payment to those to whom it is indebted. Here the defendant arranged with Lennen & Newell, Inc. for it to bill AMPI for services Lennen & Newell had rendered not to AMPI, but to the Humphrey campaign. As a result there was no documentation that AMPI had contributed $12,000 to the Humphrey campaign.

The defendant did not dispute that the two $6,000 AMPI corporate checks were received in his offices; however, he denied he saw the checks; he emphasizes the lack of direct evidence that he saw the checks after AMPI forwarded them to his office pursuant to his instructions. With the checks upon their face carrying their own indicia that they were drawn on a corporate account, his counsel recognize on this motion that this was a central matter on the issue of willfulness. Thus they state: "The question of fact in this case ultimately was whether Mr. Chestnut saw the AMPI checks . . . ."[7] Indeed, the court, in its instructions -

[6]*Spies v. United States*, 317 U.S. 492, 499, 63 S.Ct. 364, 368, 87 L.Ed. 418 (1943).

[7]Defendant's Post Trial Memorandum p. 18.

to the jury, suggested that a substantial question is: "Did the defendant ever see the AMPI checks of $6000 each . . . ?"[8] The jury answered by its verdict. There is no reason to set it aside. The totality of evidence based upon the defendant's own acts, conduct and all the surrounding circumstances warranted the jurors in drawing the reasonable inference that defendant saw the checks with their corporate legend and that he acted willfully in causing Lennen & Newell to receive or accept this corporate contribution to the Humphrey campaign which he knew was unlawful.

The defendant next contends that the evidence failed to prove venue in the Southern District of New York. In addition, he argues that venue was improper in this district.

There is no dispute that the AMPI checks were deposited by Lennen & Newell in its bank account in Manhattan and that, so far as the evidence indicates, the defendant was not then present in this district. The evidence does indicate that defendant's various acts in arranging for Lennen & Newell to bill AMPI for the advertising services and AMPI's payment with its corporate checks occurred in Minnesota. There is no proof of where the checks were physically delivered to Lennen & Newell, Inc. prior to their deposit in this district. Under these circumstances, was venue proper in this district?

[4, 5] The Sixth Amendment does not provide a defendant with a constitutional right to trial in his home district.[9] Rather, both the Sixth Amendment and Article III, section 2, of the Constitution provide that a defendant

[8]Trial Transcript 561.

[9]*Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964); *Johnston v. United States*, 351 U.S. 215, 220-21, 76 S.Ct. 739, 100 L.Ed. 1097 (1956).

must be tried in the state and district where the crime was committed. Thus in determining proper venue, the court must determine the place of the crime[10] after an analysis of the nature of the alleged offense.[11]

The defendant was found guilty of violating the law making it illegal for any "person to accept or receive" political campaign contributions prohibited by that section.[12] The jury was instructed that under another provision of law, "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."[13] The key words of the substantive statutory prohibition are "to accept or receive" an illegal contribution. The determination of the venue question requires the court to examine the statute "to ascertain when the defendant's actions have progressed to the point where a court can confidently conclude that a crime has been committed."[14]

[6] Where a statute makes it illegal to receive money under certain circumstances and the recipient is given a check, venue is proper where the check is deposited and the proceeds credited to the recepient's account. Thus in *Burton* v. *United States*,[15] the defendant was charged with violating a statute forbidding a United States Senator from receiving compensation for services rendered in relation to

[10]*United States v. Cores*, 356 U.S. 405, 407, 78 S.Ct. 875, 2 L.Ed.2d 873 (1958); *United States v. Anderson*, 328 U.S. 699, 66 S.Ct. 1213, 90 L.Ed. 1529 (1946).

[11]*Travis v. United States*, 364 U.S. 631, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961).

[12]18 U.S.C. § 610.

[13]18 U.S.C. § 2(b).

[14]*United States v. Bithoney*, 472 F.2d 16, 23 (2d Cir.), *cert. denied*, 412 U.S. 938, 93 S.Ct. 2771, 37 L.Ed.2d 397 (1973).

a proceeding in which the United States is an interested party. The Supreme Court held that venue was proper in the district where the checks were deposited and honored, not where the check was physically delivered to the Senator.[16] In *Burton*, the checks were deposited and credited to defendant in the same place where they were physically delivered to him, but as Judge Learned Hand later indicated, the Supreme Court's analysis makes clear that venue did not turn on where the checks were physically delivered.[17] In another prosecution under the same statute, although the defendant's services were performed and the checks were physically delivered to him in Washington, D.C., the court held that venue was proper in the District of Maryland, where the compensation was received, that is, where the checks were deposited and the defendant's account was credited.[18]

[7] The government's theory of the case was that the defendant caused Lennen & Newell to accept or receive an illegal corporate campaign contribution to the Humphrey campaign. Following their receipt in Minnesota, the AMPI checks were turned over to Lennen & Newell and were deposited in its bank account in the Southern District of New York. The defendant had not caused another to commit the ultimate essential element of the crime until the

[15]196 U.S. 283, 25 S.Ct. 243, 49 L.Ed. 482 (1905).

[16]*Id.*

[17]*United States v. Lotsch*, 102 F.2d 35, 36 (2d Cir.), *cert. denied*, 307 U.S. 622, 59 S.Ct. 793, 83 L.Ed. 1500 (1939). *See also United States, v. Johnson*, 337 F.2d 180, 193 (4th Cir. 1964), *aff'd*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966).

[18]*United States v. Johnson*, 337 F.2d 180, 192-95 (4th Cir. 1964), *aff'd*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966). *See also United States v. McMaster*, 343 F.2d 176, 181 (6th Cir.), *cert. denied*, 382 U.S. 818, 86 S.Ct. 42, 15 L.Ed.2d 65 (1965).

checks were received or accepted by Lennen & Newell, Inc. in payment for services rendered by it to the Humphrey campaign. Not until the checks were so received or accepted upon their deposit and credited to the Lennen & Newell account in this district was the final element of the crime effected. Venue in this district was therefore proper.

[8-10] The defendant also argues that venue is improper in this district because all of his conduct in causing the acceptance or receipt was performed by him in Minnesota. The argument is without substance. "The constitutional requirement is as to the locality of the offense, and not the personal presence of the offender."[19] For example, the general rule is that where the crime charged is a failure to do a legally required act, the place fixed for its performance, not the place where the defendant remained, fixes the situs of the crime.[20] An accessory may be tried in the district where the principal committed the crime even though the accessory never entered the district.[21] In prosecutions for making false statements in a matter within the jurisdiction of a federal agency, venue is improper in the

[19]*Armour Packing Co. v. United States*, 209 U.S. 56, 76, 28 S.Ct. 428, 433, 52 L.Ed. 681 (1908). *See also Travis v. United States*, 364 U.S. 631, 634, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961).

[20]Where a defendant was charged with failing to report for civilian work to a hospital in another district as ordered to by his draft board, which was in the district in which he resided, venue was proper only in the district where the hospital was located, not in the district of his residence where he remained throughout the relevant period. *Johnston v. United States*, 351 U.S. 215, 220-21, 76 S.Ct. 739, 100 L.Ed. 1097 (1956). *See also United States v. Dyson*, 469 F.2d 735 (5th Cir. 1972); *United States v. Clark*, 468 F.2d 708 (3d Cir. 1972); *United States v. Turner*, 244 F.2d 404 (2d Cir.), *cert. denied*, 354 U.S. 926, 77 S.Ct. 1384, 1 L.Ed.2d 1438 (1957).

[21]*United States v. Buckhanon*, 505 F.2d 1079, 1083 (8th Cir. 1974); *United States v. Kilpatrick*, 458 F.2d 864 (7th Cir. 1972); *United States v. Bozza*, 365 F.2d 206, 220-21 (2d Cir. 1966); *United States v. Gillette*, 189 F.2d 449, 451-52 (2d Cir.), *cert. denied*, 342 U.S. 827, 72 S.Ct. 49, 96 L.Ed. 625 (1951).

district where the affidavit was written and mailed, but lies instead where the affidavit is required to be filed[22] or where agency decision in reliance thereon takes place.[23]

The court does not understand the defendant to argue that merely upon the receipt of the checks in Minnesota or even upon his causing the checks to be delivered to Lennen & Newell, a crime was committed. Indeed, the defendant could have returned the checks to AMPI, or destroyed them, or never caused their delivery to the advertising agency, or even recalled them after Lennen & Newell had physically received them, in which event no crime would have been committed since the final element of the crime would have been lacking. The receipt or acceptance of the contribution occurred when the checks were deposited in New York in payment of a Humphrey campaign bill. The offense occurred in this district and venue was proper.[24] This disposi-

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[22] *Travis v. United States*, 364 U.S. 631, 634, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961); *United States v. Lombado*, 241 U.S. 73, 36 S.Ct. 508, 60 L.Ed. 897 (1916).

[23] *United States v. Candella*, 487 F.2d 1223, 1228 (2d Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1563, 39 L.Ed.2d 872 (1974). *See also United States v. Bithoney*, 472 F.2d 16, 24 (2d Cir.), *cert. denied*, 412 U.S. 938, 93 S.Ct. 2771, 37 L.Ed.2d 397 (1973).

[24] Accordingly the court does not reach the question of whether under 18 U.S.C. § 3237(a) venue would also be proper in the District of Minnesota. The defendant argues that venue lies only in that district. Contrary to the defendant's contention, Judge Friendly's analysis in *United States v. Bozza*, 365 F.2d 206, 220 (2d Cir. 1966), suggests that the government may have had a more difficult problem had the prosecution been in the District of Minnesota. *But see United States v. Taller*, 394 F.2d 435, 437-38 (2d Cir.), *cert. denied*, 393 U.S. 839, 89 S.Ct. 115, 21 L.Ed.2d 109 (1968).

So, too, this disposition makes it unnecessary to consider whether, under 18 U.S.C. § 3237(a), when the tainted corporate contribution is made by check, the receipt of the contribution is a continuing offense which does not end until the proceeds of the check have been made fully available to the recipient and hence venue may be in more than one district if the check is deposited in one district and paid in another. *See United States v. Johnson*, 337 F.2d 180, 193-95 (4th Cir. 1964), *aff'd*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966).

tion makes it unnecessary to consider the government's contention that in any event the defendant waived the venue issue by not moving at the appropriate time.

Other items raised by the defendant in support of his motion for a new trial require little discussion.

[11] The defendant argues that proof of similar acts was improperly admitted. Proof of similar acts on the defendant's part in accepting three other contributions from AMPI employee Bob Lilly was admitted solely as tending to show a pattern of conduct on the issues of knowledge and intent at the time of the events charged in the indictment.[25] Cautionary instructions were given to the jury as to the limited purpose for which this evidence was received,[26] first when offered and again in the final instructions.

The defendant further contends that the court's instruction on the credibility of the defendant as a witness was prejudicial. The instruction was proper and in accordance with authority in this circuit.[27]

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[25] *See United States v. Campanile*, 516 F.2d 288 (2d Cir. 1975); *United States v. Gerry*, 515 F.2d 130 (2d Cir. 1975); *United States v. Papadakis*, 510 F.2d 287, 294-95 (2d Cir. 1975); *United States v. Miller*, 478 F.2d 1315 (2d Cir.), *cert. denied*, 414 U.S. 851, 94 S.Ct. 144, 38 L.Ed.2d 100 (1973); *United States v. Williams*, 470 F.2d 915, 917 (2d Cir. 1972); *United States v. Johnson*, 382 F.2d 280, 281 (2d Cir. 1970).

[26] T. 556-57. *See United States v. Papadakis*, 510 F.2d 287, 295 (2nd Cir. 1975); *United States v. Klein*, 340 F.2d 547, 548-49 (2d Cir.), *cert. denied*, 382 U.S. 850, 86 S.Ct. 97, 15 L.Ed.2d 89 (1965).

[27] *United States v. Dozier*, 522 F.2d 224 (2d Cir. 1975); *United States v. Tyers*, 487 F.2d 828 (2d Cir. 1973); *United States v. Mahler*, 363 F.2d 673 (2d Cir. 1966); *United States v. Sullivan*, 329 F.2d 755 (2d Cir.), *cert. denied*, 377 U.S. 1005, 84 S.Ct. 1943, 12 L.Ed.2d 1054 (1964). *See also Reagan v. United States*, 157 U.S. 301, 304-11, 15 S.Ct. 610, 39 L.Ed. 709 (1895); *United States v. Hill*, 152 U.S.App.D.C. 213, 470 F.2d 361 (1972). The language used by the court was recently reviewed and approved by our Court of Appeals in *United States v. Sclafani*, 487 F.2d 245 (2d Cir.), *cert. denied*, 414 U.S. 1023, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973).

The court has considered the other items raised by the defendant and finds them without merit.

A careful review of the record convinces the court that the jury's verdict is supported by substantial evidence and that the defendant received a fundamentally fair trial.

The motions for a judgment of acquittal, new trial and arrest of judgment are denied in all respects.

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 316—September Term, 1975.

(Argued October 7, 1975—Decided March 8, 1976.)

Docket No. 75-1268

UNITED STATES OF AMERICA,

Appellee,

v.

JACK L. CHESTNUT,

Appellant.

Before:

WATERMAN, OAKES and MESKILL,

Circuit Judges.

Appeal from a judgment of conviction of causing another to accept and receive an illegal corporate campaign contribution in violation of 18 U.S.C. §§610, 2, entered in

the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge*, after a jury trial.

Affirmed.

EUGENE F. BANNIGAN, Assistant United States Attorney, Southern District of New York (Paul J. Curran, United States Attorney, Robert Gold, John D. Gordan, III, Assistant United States Attorneys, Southern District of New York, of counsel), *for Appellee*.

JACK S. NORDBY, ESQ., Saint Paul, Minnesota (Douglas W. Thomson, Esq., Thomson, Wylde & Nordby, Saint Paul, Minnesota, John A. Cochrane, Esq., Cochrane & Bresnahan, Saint Paul, Minnesota, of counsel), *for Appellant*.

Meskill, Circuit Judge:

Jack L. Chestnut appeals from a judgment of conviction of causing another to accept and receive an illegal corporate campaign contribution in violation of 18 U.S.C. §§610, 2.[1] After a four day trial before Edward Weinfeld,

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[1]In 1970, the time of the offense charged, 18 U.S.C. § 610 provided, in pertinent part, as follows:

"It is unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with any election at which . . . a Senator . . . [is] to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for . . . [such office], or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section."

18 U.S.C. § 2(b) states:

"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

District Judge, the jury returned a guilty verdict. On June 25, 1975, Chestnut was sentenced to four months in prison and fined $5,000.

Appellant Chestnut offers six arguments on this appeal: (1) that the language and circumstances of the indictment proved the prosecution to be ex post facto; (2) that the indictment failed to state an offense because the payment described was a lawful expenditure rather than a contribution; (3) that venue in the Southern District of New York was improper because every element of the questioned transaction except actual deposit of the checks occurred elsewhere; (4) that the evidence failed to prove beyond a reasonable doubt the willfulness element of the crime; (5) that allowing a government witness to offer an opinion as to the legality of a contribution was prejudicial error; (6) that, on its face and as applied, 18 U.S.C. §610 was unconstitutionally vague and overbroad. Judge Weinfeld, thoroughly considering these contentions in his pretrial and post-trial opinions, *United States v. Chestnut*, 394 F. Supp. 581, 399 F. Supp. 1292 (S.D.N.Y. 1975), concluded that they were without merit. We agree and affirm the judgment of conviction.

The Facts:

In mid-February, 1970, Jack L. Chestnut, a Minneapolis attorney, became manager of Hubert H Humphrey's 1970 Senatorial campaign in Minnesota. At a meeting in that state, Chestnut sought the services of Campaign Planners, an entity created to handle the political advertising accounts of Lennen & Newell, Inc. ("L & N"), a now-defunct New York advertising agency. An agreement was

reached several weeks later, after L & N mailed its written proposal to Chestnut. Payment was to be made to L & N in flat monthly fees which increased in size as the campaign progressed towards election day; *in toto* the Humphrey campaign planned to spend about $72,000 for L & N's services. Since L & N had no Minnesota offices, its representatives worked out of Chestnut's Minneapolis law office. Other campaign business was also conducted from the law firm's office, with Penny Miller, the law firm's office manager, and Jennifer Broome, secretary for the campaign, constituting the core of the campaign staff.

Associated Milk Producers, Inc. ("AMPI"), a cooperative organization of dairy farmers, collects from its members voluntary donations to a political fund, Trust Agricultural Political Education ("TAPE"), from which it lawfully can contribute to political campaigns. TAPE funds, totally segregated from AMPI funds, are dispensed from its own checking account. Representatives of AMPI had assured the Humphrey campaign of between $40,000 and $50,000 in contributions; Bob Lilly was the liaison between AMPI and the Humphrey campaign staff.

Lilly's testimony revealed the nature of AMPI's involvement in unlawful corporate political spending. After the 1968 presidential election, AMPI apparently became concerned about its standing with the new Republican administration. AMPI officials did not want the administration to be aware of contributions made to Democrats. Since TAPE's contributions had to be publicly reported, corporate officials decided to indirectly make donations by using corporate funds to reimburse AMPI employees who had made personal donations or by simply using corporate checks to make contributions.

With this background, we turn to the sequence of events which resulted in Chestnut's indictment. It appears that in the spring of 1970 AMPI's General Manager, Harold Nelson, asked Chestnut if there were any Humphrey campaign bills to be paid. The two men agreed that AMPI would pay $12,000 toward the Humphrey campaign's debt to L & N. Chestnut testified that it was his understanding that the contributions were to come from TAPE, AMPI's political arm. There was conflicting testimony as to how well financed the Humphrey forces were at this early stage of the campaign.

In accordance with Chestnut's instructions to bill AMPI, L & N sent one invoice charging AMPI $12,000 for "consulting fee[s] in Minnesota." In an episode never satisfactorally explained, Chestnut then called Lilly to inform him not to pay that invoice but to await a corrected bill which he, Chestnut, would forward; Chestnut confirmed these instructions by letter on May 7, 1970. Five days later AMPI received from Chestnut four L & N invoices, each in the amount of $3,000, made out to AMPI. Once again following Chestnut's written instructions, Lilly transmitted two AMPI checks to Chestnut's office; these checks clearly were drawn on the corporate account and payable to L & N. Although Chestnut's memory of subsequent events was unclear, he denied that he had ever seen the AMPI checks. Members of his office staff testified that, by their usual business procedures, they would have forwarded the checks to L & N without calling them to Chestnut's attention. Furthermore, the staff had been instructed that no corporate checks would be accepted as contributions. The checks from AMPI to L & N were deposited in L & N's New York bank and formed the basis of Chestnut's indictment.

At trial the government, over defense counsel's objection, introduced evidence of other suspect events for the limited purpose of showing similar conduct relevant to Chestnut's awareness of wrongdoing, i.e., the "willfulness" element of the crime. The government elicited testimony from Lilly, who appeared under a grant of immunity, that three other campaign contributions had been made: Lilly's personal check in the amount of $10,000 prior to the L & N payments; a remittance by Lilly of $1,450 by personal check pursuant to Chestnut's request; and, $12,500 in cash which Lilly delivered to Chestnut late in the campaign. In addition, Chestnut's law firm received $5,000 indirectly from AMPI for legal services. AMPI paid this money to a third party on its payroll as a consultant, who then transferred it to Chestnut; the corporation later denied that Chestnut was one of its lawyers.

The government also questioned Penny Miller, Chestnut's office manager, about her testimony before the Grand Jury. At Chestnut's trial, there was evidence presented that Chestnut, after receiving legal advice that such action would be proper, authorized his staff to destroy financial records from the 1970 campaign. In her first appearance before the Grand Jury, Mrs. Miller refused to answer questions about this action. After receiving a grant of immunity the next day, Mrs. Miller testified about a conversation with Chestnut concerning the Senate Watergate investigation, in which conversation Chestnut had said that there was nothing damaging in the financial records, that they, meaning the Watergate Committee, could do him no harm via the records, but that his staff should get rid of them anyway. On the witness stand at Chestnut's trial, Mrs. Miller testified that the records were destroyed prior to the convening

of the Watergate Committee.

The government also introduced handwriting exemplars taken by the F. B. I. in 1974 to compare with other samples of Chestnut's signature; a handwriting expert testified that although the two sets of signatures had been written by Chestnut, they looked as though they had been written by different people.

Chestnut testified in his own behalf. He stated that his understanding throughout his interactions with Lilly had been that any campaign donations from AMPI were to come from TAPE. Furthermore, he denied that he had ever seen the L & N checks that AMPI had sent to his office. Seven character witnesses attested to Chestnut's reputation for truth and honesty. There was also testimony that, on at least one occasion, Chestnut had returned to its sender a check drawn on a corporate account.

I. The Indictment.

Chestnut attacks the indictment on two grounds: that he was subjected to an ex post facto prosecution because the indictment was returned under the 1972 version of the statute[2] rather than the 1970 statute in force when

[2]The 1970 version of § 610 contained no definition of the terms "contribution" and "expenditure." These terms were defined in a separate section, 18 U.S.C. § 591, as follows, in pertinent part:

"The term 'contribution' includes a gift, subscription, loan, advance, or deposit, of money, or anything of value . . . ."

"The term 'expenditure' includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value . . . ."

in 1972 § 610 was amended to include, *inter alia*, a definition of "contribution or expenditure" as follows, in pertinent part:

"As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or anything of value . . . ."

Amended February 7, 1972, Pub. L. 92-225, Title II, § 205, 86 Stat. 10.

The definitional section, § 591, was amended at the same time as to these terms. 86 Stat. 8.

the offense was allegedly committed, and that the indictment failed to charge an offense under the 1970 version of the statute. We find both arguments unpersuasive.

In support of his claim that the wrong law was presented to the Grand Jury, Chestnut emphasizes the incompleteness of the statutory citation in the indictment, the similarity in the language of the indictment to the language of the 1972 amendment, and the fact that a copy of the 1972 version of the statute was attached to a press release issued by the prosecution. An indictment is sufficient if it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend and enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974). The court must look at the allegations pleaded in the indictment to determine whether an offense has been charged. *United States v. Hutcheson*, 312 U.S. 219, 229 (1941); *Paz Morales v. United States*, 278 F.2d 598, 599 (1 Cir. 1960); *United States v. Kolodny*, 149 F.2d 210, 211 (2 Cir. 1945).

The unexplained episode in which the 1972 statute was appended to the press release does not determine the validity of the indictment. Properly looking at the facts pleaded in the indictment itself, the district court correctly concluded that an offense under the 1970 statute had been charged. Any similarity to the language of the 1972 statute is inconsequential since, "[t]he allegations which spell out the payment by AMPI to L & N for the services it rendered to the Humphrey campaign merely describe the details whereby it is charged the defendant engaged in artifice or subterfuge to conceal the receipt of the contribution." 394

F. Supp. at 585. Indeed, in *Pipefitters Local No. 562* v. *United States*, 407 U.S. 385, 399 (1972), the Supreme Court explicitly held that, with one exception not relevant to the instant case, the 1972 amendments made no substantive changes in the statute but "merely codifie[d] prior law." We thus conclude that Chestnut's argument that the events described in the indictment could be illegal only under the amended version of §610 is without merit. The failure to cite properly the statute charged in the indictment would be ground for dismissal only if Chestnut had been misled to his prejudice. Rule 7(c), Fed. R. Crim. P.; *United States v. Calabro*, 467 F.2d 973, 981 (2 Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States v. Rivera*, 513 F.2d 519, 533 n. 21 (2 Cir. 1975). Here the non-conformity merely consisted of omission of the definitional section's number and the notation that the statute had been amended. It is inconceivable that such omissions could have misled Chestnut as to the nature of the charges against him.[3] Furthermore, any doubts that Chestnut might have entertained as to which version of the statute formed the basis of his indictment should have been resolved by the district court's pretrial ruling on this very issue.

Chestnut also contends that the payment by AMPI to L & N was really an "expenditure" rather than a "contribution," as charged in the indictment, because expenditures are indirect payments while contributions include only gifts or direct payments; he then reasons that since §610 did not make it a crime to receive an expenditure, the in-

[3]Compare *United States v. Beard*, 436 F.2d 1084 (5 Cir. 1971), where the government, after trial had begun, attempted to substitute a totally different and unrelated statute for that charged in the indictment. Such a substitution was, of course, held to be constitutionally impermissible.

dictment failed to charge an offense. Even applying Chestnut's own analytic framework to the facts of this case, we find that AMPI's checks to L & N constituted a contribution to the Humphrey campaign.

The touchstone of Chestnut's argument is that AMPI's checks to L & N represented an expenditure by the corporation. In 1970 the statutory definition of a contribution included "a gift, subscription, loan, advance, or deposit, of money, or anything of value. . . ." Since AMPI had incurred no debt of its own to L & N because L & N had performed no services for AMPI, we agree with the district court that "picking up another's obligation—here a Humphrey campaign debt to L & N—is a gift of money, in short, a contribution to the Humphrey campaign." 394 F. Supp. at 586. It was only because Chestnut directed AMPI to pay some of the Humphrey campaign obligations due L & N that any transaction occurred between the two. Even though AMPI issued checks payable to L & N rather than the campaign committee itself, the corporation was making a contribution to the Humphrey campaign.

The Supreme Court's extensive discussion of § 610 in *United States* v. *Auto Workers*, 352 U.S. 567 (1957), fully supports this conclusion. In that case, which concerned an "expenditure" violation, the Court concluded that the indictment charged an offense where a union used monies from its general treasury to pay for commercial television broadcasts sponsored by the union. The Court emphasized that Congress had added the prohibition of "expenditures" to § 610 to cover a union's distribution of its funds to state its own position to the world. 352 U.S. at 585. These "expenditures," however, resulted from obligations incurred by the union or corporation in presenting *its* views. "Con-

tributions," then, must encompass "gifts . . . or anything of value" made to the candidate or his campaign organization to assist the candidate in presenting his message to the public. In the instant case, AMPI incurred no obligations of its own to L & N. Rather, in lieu of giving money directly to the campaign organization, AMPI discharged obligations incurred by the campaign organization in promoting its candidate to the public, thus making a contribution.

II. Venue.

Chestnut next asserts, as he did in the district court, that trial in New York, rather than in Minnesota, was constitutionally impermissible because every element of the transaction, except the actual deposit of the checks, occurred outside New York.

It is clear that "[q]uestions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). The Constitution requires that "[T]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . . ." Art. III, § 2, cl. 3. The Sixth Amendment further guarantees trial "by an impartial jury of the State and district where in the crime shall have been committed . . . ."[4] In *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 245 (1964), a unanimous Supreme Court rejected "the erroneous holding of the Court of Appeals that crim-

[4]Rule 18, Fed. R. Crim. P., implements these constitutional commands by providing that prosecutoin shall occur in a district in which the offense was committed, except as otherwise permitted by statute or the Criminal Rules.

inal defendants have a constitutionally based right to a trial in their home districts." It thus appears settled that proper venue in a criminal case is determined by the locus of the offense. *United States* v. *Cores*, 356 U.S. 405, 407 (1958); *United States* v. *Anderson*, 328 U.S. 699, 704-05 (1946). *See also* C. Wright, 1 Federal Practice and Procedure, § 301 at 581-582 (1975).

In determining proper venue then, the district court must ascertain both the nature of the offense and the location of the acts constituting it. *United States* v. *Anderson, supra*, 328 U.S. at 703; *United States* v.*Cores, supra*, 356 U.S. at 408. One helpful technique has been to study the key verbs which define the criminal offense in the statute. *United States* v. *Slusky*, 487 F. 2d 832, 839 (2 Cir.), *cert. denied*, 416 U.S. 937 (1973); *United States* v. *Bithoney*, 472 F. 2d 16, 23 (2 Cir.), *cert. denied*, 412 U.S. 938 (1973). The defendant in the instant case was charged with violating 18 U.S.C. §§ 610 and 2 by willfully causing L & N to receive an unlawful corporate contribution on behalf of the Humphrey campaign. Chestnut first argues that the offense, if any, consisted of his actions in Minnesota, *i. e.*, causing the unlawful contribution, rather than causing L & N's receipt of the checks in New York. Clearly the substantive offense charged here is the receiving and accepting of an unlawful contribution. The causation aspect of the charge, derived from § 2, makes punishable as a principal one who willfully causes another to commit an offense. Since § 2 itself does not define a crime, *United States* v. *Gerhart*, 275 F. Supp. 443, 445 (S.D.W.Va. 1967), Chestnut's argument must fail. *See also United States* v. *Bozza*, 365 F. 2d 206, 222 (2 Cir. 1966); *United States*

v. *Campbell*, 426 F. 2d 547, 553 (2 Cir. 1970). The constitutional standards for venue concern the locality of the substantive offense rather than the location of the offender at the time of the offense. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76 (1908); *see also Travis* v. *United States*, 364 U.S. 631, 634 (1961).

The Court must next decide "when the defendant's actions have progressed to the point where a court can confidently conclude that a crime has been committed." *United States* v. *Bithoney, supra*, 472 F. 2d at 23. We conclude that venue in the Southern District was constitutionally proper because the deposit of the checks in New York, where the principal offices and officers of L & N were located, constituted the ultimate essential element of the offense of accepting and receiving an unlawful contribution.[5]

Prior cases have held that when a check is used to make a forbidden payment, venue is proper where the check is deposited. In *Burton* v. *United States*, 196 U.S. 283 (1905), the defendant, a United States Senator, was convicted in Missouri of receiving payment for services rendered in a proceeding in which the United States was a party. Checks for these services were mailed from St. Louis to the defendant in Washington. The Court held that the deposit of the checks in Washington constituted the receiving of payment that was forbidden by the statute; thus the crime occurred in Washington and venue in Missouri

[5]Chestnut argues that the offense in question here was not a continuing offense which might be prosecuted in more than one district under 18 U.S.C. § 3237(a). In essence he claims that venue in this case was proper only in Minnesota. Since we have concluded that venue in New York was constitutionally permissible, we need not consider whether the offense defined in § 610 is a continuing offense which also might have been prosecuted in Minnesota.

was improper.[6] Since the Court in the *Burton* case discussed at length the niceties of banking law in analyzing where payment of the check occurred,[7] it is at least clear that the place of *delivery* of a check does not determine venue.[8] *United States* v. *Lotsch*, 102 F. 2d 35, 36 (2 Cir.) *cert. denied*, 307 U.S. 622 (1939); *see also United States* v. *Johnson*, 337 F. 2d 180, 193 (4 Cir. 1964), *aff'd.* 383 U.S. 169 (1966). Consequently, it is not crucial to determine whether the checks involved in the instant case were delivered to L & N in Minnesota or New York.[9] Until the checks were deposited, the campaign debt was not discharged and no unlawful contribution had been received.

[6]Another trial was held which culminated in a second Supreme Court opinion, *Burton v. United States*, 202 U.S. 344 (1906). In this later case the Court discussed venue only as it related to a new count in the indictment which charged Burton with agreeing to receive compensation. The Court upheld the jury's finding that an unlawful agreement occurred in Missouri.

[7]The Court found that under the District of Columbia banking laws, the deposit of checks and the drawing against them by customers created a relationship of debtor and creditor, and the bank became the absolute owner of the check rather than the customer's agent for collection; this status was not affected by the bank's right to proceed against the customer if the checks were not paid. 196 U.S. at 297. New York's banking law appears to be in accord. *See, e.g., Menkes Feuer, Inc. v. People's Bank*, 43 N.Y.S.2d 32, 35 (Sup. Ct. 1943), *aff'd*, 268 App. Div. 809 (3d Dept. 1944), 48 N.Y.S.2d 593, *lv. to app. denied*, 268 App. Div. 836 (3d Dept. 1944).

[8]Senator Burton clearly received the check in Washington. Therefore, if the place of receipt was the determinative factor, the Court easily could have resolved the venue question without considering banking law.

[9]Additionally there can be little question that the intent of the parties throughout this transaction was to transfer funds to L & N, located in New York. *See, United States v. Grossman*, 400 F.2d 951, 954 (4 Cir.), *cert. denied*, 393 U.S. 982 (1968), where, in an antikickback case, the court held that the payment proscribed was made in the state and district of indictment where the intention of the parties was to vest ownership of corporate stock in a donee at a time when he was domiciled and physically present in such state even though the certificates were delivered to the donee's mother in another state.

Finally, in *United States* v. *McMaster*, 343 F. 2d 176, 181 (6 Cir.), *cert. denied*, 382 U.S. 818 (1965), where a donee was prosecuted for receiving a payment in violation of the Labor Management Relations Act, the court held that the deposit of corporate checks in a bank account in Detroit was sufficient, for purposes of venue, to establish payment in the Eastern District of Michigan. We therefore concur in the district court's conclusion that the offense occurred when AMPI's corporate checks were deposited in L & N's New York City bank account, thus discharging a debt owed by the Humphrey campaign. Venue in the Southern District of New York was proper.

III. Sufficiency of the Evidence.

Chestnut also claims that the government failed to prove beyond a reasonable doubt that he saw the checks in question or knew that they were drawn on a corporate account. He therefore concludes that the government did not make the requisite showing of willfulness, an essential element of the offense charged. To buttress this argument, Chestnut cites his lack of motive for accepting corporate funds, evidence that he had once returned such a check, and office procedures which would have resulted in his staff automatically forwarding the checks to L & N.

Viewing the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), this Court will sustain a verdict where "a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States* v. *Freeman*, 498 F. 2d 569, 571 (2 Cir. 1974); *see also United States* v. *Taylor*, 464 F. 2d 240, 243 (2 Cir. 1972). Recognizing the inherent difficulty in establishing a willful violation of the law by direct evi-

dence, the Supreme Court has held that willfulness may be inferred from the "handling of one's affairs to avoid making the records usual in transactions . . . and . . . [from] conduct, the likely effect of which would be to mislead or to conceal." *Spies* v. *United States*, 317 U.S. 492, 499 (1943) Inferences of willfulness by juries have been upheld where, for example, extremely unusual circumstances were involved in a course of conduct and the defendant's explanation was implausible. *See United States* v. *De Garces*, 518 F. 2d 1156, 1160 (2 Cir. 1975); *United States* v. *LaFroscia*, 485 F. 2d 457 (2 Cir. 1973). The absence of proof of motivation is not fatal to the government's case where there is sufficient evidence of criminal intent. *United States* v. *Simon*, 425 F. 2d 796, 809 (2 Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970).

At trial the government adduced evidence that Chestnut devised and actively participated in the indirect procedures by which the Humphrey campaign would benefit from AMPI's largesse. The evidence, as succinctly summarized by the district court, showed that Chestnut was deeply involved in accomplishing payment by a particular format:

> "It was the defendant who directed both Lennen & Newell, Inc. and Bob Lilly . . . to carry out the procedures whereby the advertising agency, which had rendered services to the Humphrey campaign, not to AMPI, would prepare invoices to be made out to AMPI and for AMPI to pay those invoices. It was the defendant who instructed Lilly not to pay the invoices because they were not in proper form, but to await corrected bills. It was the defendant who sent a letter to Lilly to have AMPI pay the enclosed four corrected invoices . . ., instructing him to forward

checks made payable to Lennen & Newell to him, the defendant at his office in Minneapolis. . . ." 399 F. Supp. at 1294.

A jury could conclude that this manner of payment of campaign debts, whereby L & N billed AMPI for "consulting fee[s] in Minnesota" and AMPI issued checks payable to L & N, was intended to avoid making the usual records, with the likely effect of concealment of the transaction. The defense presented no cogent explanation as to why contributions were made in this manner. Given this elaborately indirect plan for making a political contribution and Chestnut's active role in insuring its effectiveness, we find that a reasonable mind could have inferred willfulness beyond a reasonable doubt.

IV. Admissibility of "Similar Act" Evidence.

Chestnut asserts that the trial court committed prejudicial error by allowing Bob Lilly to testify about three other contributions made to the Humphrey campaign. More specifically, Chestnut argues that this evidence falls outside this Circuit's inclusory rule because the other acts were not similar to the offense charged and thus went to show only Chestnut's criminal character. Chestnut also urges that the district court erred in permitting Lilly to express his opinion that these contributions violated 18 U.S.C. § 608's $5,000 limitation on donations.[10] Finally, Chestnut

[10]In 1970, 18 U.S.C. § 608 provided in pertinent part:

"(a) Whoever, directly or indirectly, makes contributions in an aggregate amount in excess of $5,000 during any calendar year, or in connection with any . . . election, to or on behalf of any candidate for an elective Federal office . . . or to or on behalf of any committee or other organization engaged in furthering, advancing, or advocating the . . . election of any candidate . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both."

"This subsection shall not apply to contributions made to or by a State or local committee or other State or local organization . . . ."

claims that since these other contributions were in fact lawful under § 608, error was committed when the court below refused to instruct the jury on this statute.

Turning first to Chestnut's argument that the evidence of other contributions was not admissible, it is settled in this Circuit that evidence of other offenses is admissible if "it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." *United States* v. *Papadakis*, 510 F. 2d 287, 294 (2 Cir.), *cert. denied*, 421 U.S. 950 (1975); *see also, United States* v. *Gerry*, 515 F. 2d 130, 141 (2 Cir. 1975). Such evidence has been admitted for the purposes of showing willfulness; its probative value, determined by the trial court, is dependent on "the existence of a close parallel between the crime charged and the acts shown." *United States* v. *Leonard*, 524 F. 2d 1076, 1091 (2 Cir. 1975); *see also United States* v. *Santiago*, Dkt. No. 75-1179 (2 Cir. January 12, 1976), slip op. 6577, 6582.

Lilly testified that he remitted three other payments to the Humphrey campaign, two personal checks to the Minnesota Democratic Campaign Committee ("MDCC") of $10,000 and $1,450, made out pursuant to Chestnut's instructions and mailed to him, and $12,500 in cash personally delivered by Lilly to Chestnut at his law offices. Judge Weinfeld admitted this testimony with a limiting instruction to the jury that its relevance was confined solely to the issue of willfulness or intent; the district court repeated this restriction in its charge to the jury.

Given the trial court's cautionary instructions, we cannot find that admission of this evidence was reversible er-

ror. The "similar acts" occurred in close temporal proximity and were closely related in both subject matter and manner to the crime charged in the indictment. It was well within the trial court's discretion to determine that the course of conduct in which Chestnut engaged with regard to the three contributions was probative of his knowledge and intent as to the transaction involving L & N, and that admission of this evidence for that limited purpose was not unduly prejudicial. *United States* v. *Harvey*, Dkt. No. 75-1053 (2 Cir. November 20, 1975), slip op. 6493, 6506.

Chestnut also argues that error occurred in allowing Lilly to testify that, in his opinion, the two checks and the cash donation violated § 608's $5,000 limitation on contributions.[11] We disagree. The cases cited by Chestnut are not apposite to the instant situation. In *Huff* v. *United States*, 273 F. 2d 56 (5 Cir. 1959), error was found in permitting a customs inspector with 28 years of experience to testify as to his interpretation of the customs law. The Court of Appeals for the Fifth Circuit held that this highly prejudicial testimony was impermissible because, in essence, it infringed upon the court's duty to charge the jury as to the applicable law. Similarly, in *United States* v. *Phillips*, 478 F. 2d 743 (5 Cir. 1973), that same court found error in allowing a postal inspector to testify on a question of law or a mixed question of law and fact.

In the instant case, Lilly's status was not that of a government official but an admitted wrongdoer testifying un-

[11]The government claims that Chestnut cannot now argue this point because he offered no objection below. *United States v. Indiviglio*, 352 F.2d 276 (2 Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). However, a careful review of the trial transcript reveals that during the government's examination of Lilly about the use of TAPE funds, defense counsel specifically objected to inquiry about § 608's $5,000 limitation because a "legal conclusion" was being sought from Lilly. This objection was sufficient to preserve this point for appeal.

der a grant of immunity. He was thoroughly cross-examined by defense counsel, during which his lack of knowledge about § 608's exemption for state campaign organizations was revealed. *Cf. United States* v. *Gottlieb*, 493 F. 2d 987, 992 (2 Cir. 1974). Furthermore, the defense presented its own witnesses to testify that the contributions to the state committee were lawful under § 608. Although it would have been preferable for the government to refrain from soliciting Lilly's interpretation of the law, Chestnut suffered no prejudice therefrom. What was damaging was the properly admitted evidence that a series of other transactions had occurred from which Chestnut's willfulness could be inferred, not Lilly's opinion about the legality of the transactions themselves. We similarly reject Chestnut's argument that the district court erred in refusing to instruct the jury on § 608. Judge Weinfeld's charge to the jury covered all the essential elements of the offense for which Chestnut was being tried; it further emphasized that Lilly's testimony was to be considered only in relation to the question of Chestnut's knowledge and intent at the time of the offense charged. See *United States* v. *Hoffman*, 415 F. 2d 14, 20 (7 Cir.), *cert. denied*, 396 U.S. 958 (1969).

V. Constitutional Claims.

Chestnut argues that §§ 591 and 610 are unconstitutionally vague and overbroad. Judge Weinfeld, devoting a substantial portion of his pre-trial opinion to a thorough consideration of these identical arguments, rejected Chestnut's claims. 394 F. Supp. at 587-591. Since we agree with both his reasoning and conclusions, we find no need to

amplify further the district court's comprehensive analysis of these issues.[12]

Judgment of conviction affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Fifth day of May, one thousand nine hundred and seventy-six.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK L. CHESTNUT,
Defendant-Appellant.

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[12]Generally, the district court held that the 1970 version of the statute conveyed, with a reasonable degree of certainty, fair warning of what is or is not prohibited; furthermore, even if the outermost boundaries of the statute were imprecise, Chestnut's conduct fell within the "hard core" of the statutes proscriptions. Assuming *arguendo* that Chestnut had standing to challenge the breadth of the statute, the trial court found that the statute met the "least drastic means test" by prohibiting only contributions or expenditures from certain sources. The court below concluded that since conduct and not just speech was regulated, any overbreadth was not substantial in light of the government's legitimate interests in preserving the integrity of the electoral process and in preventing corporations and unions from using general funds for political purposes without the consent of stockholders or union members. *See also United States v. Boyle*, 482 F. 2d 755, 763 (D.C. Cir.), *cert. denied*, 414 U.S. 1076, (1973) (constitutionality of § 610 as to unions upheld). Nothing in *Buckley v Valeo*, 44 U.S.L.W. 4127 (U.S. Jan. 30, 1976), is to the contrary. *See also* Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1263 n. 169 (1975).

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant Jack L. Chestnut, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and is hereby DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge

Supreme Court, U. S.
FILED
SEP 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 75-1779
OCTOBER TERM, 1976

JACK L. CHESTNUT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENT TO PETITION

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This supplement is filed pursuant to Rule 24(5) to call to the Court's attention an intervening matter not available at the last filing.

STATEMENT

One of the questions presented by the petition herein is whether the campaign contribution statutes under which petitioner was convicted were unconstitutionally vague and overbroad in their definitions of "contribution" and "expenditure". (Pet. pp. 12-19)

Since the last filing, a similar question has arisen with regard to the legality of the League of Women Voters' proposed sponsorship of television debates between certain presidential candidates.

Petitioner contends that the emergence of the question

whether these debates would violate contribution statutes, and the Commission's response to the question, illustrate and underscore the dangers of chilling both First Amendment rights and the public's right to know which are inherent in the present legislation, and were even more grave under the versions of these statutes in force at the time of petitioner's conduct. This in turn emphasizes the importance of having this Court examine the statutes and resolve their ambiguities, or strike them down so that Congress may do so.

We accordingly reproduce hereafter the "Policy Statement" issued by the Commission on August 30, 1976, obtained from the office of the Federal Election Commission, and ask the Court to consider it in conjunction with the arguments in the petition.

POLICY STATEMENT
PRESIDENTIAL DEBATES

The League of Women Voters' Educational Fund proposes to sponsor several debates between the 1976 Republican and Democratic presidential nominees. It is the Commission's view that, in the limited circumstances of presidential debates, the costs incident thereto which will be incurred by the Fund are neither contribution nor expenditures under 2 U.S.C. §§441a and 431 of the Federal Election Campaign Act of 1971, as amended.

There are a number of factors which have brought the Commission to this conclusion. The League has a history of approximately 50 years of non-partisan educational activity in the electoral process, and is, indeed, forbidden by its by-laws to endorse candidates or to otherwise appear in a partisan light. The activity proposed to be undertaken here is in keeping with that tradition. Unlike sponsorship of an appearance by a single candidate, the unavoidable impact of which is to advance the chances of that candidate's election, the debate described in the League proposal does not involve that kind of advocacy or assistance to a campaign to which the Act's contribution limits are directed. In short, it is the Commission's view that the disbursements by the League, or by any other comparable or similarly qualified organization, through a charitable trust fund are not made for the purpose of influencing a Federal election and are therefore not contributions as defined in 2 U.S.C. §431(e) or 26 U.S.C. §§9003(b) (2) and 9012(b). The League may raise funds specifically earmarked for sponsorship of the debates from private individuals. Since these funds are outside the scope of the definition of contribution under 2 U.S.C. §431, they may be made without limit and would not need to be disclosed. However, the Commission believes that the League could further the spirit of campaign finance reform by disclosing the amounts and sources of those donations.

The disbursements by the League's Education Fund are nonetheless disbursements "in connection with" a Federal election and accordingly may not be made with funds from corporate or labor organization treasuries, see 2 U.S.C. §441b, or made by other persons forbidden to participate in the Federal election process by the Act, see *inter alia,* 2 U.S.C. §441c.

The Commission is further of the opinion that a separate segregated fund established by a corporation or labor organization may donate funds, without regard to amount, to the League of Women Voter's Education Fund.

Since this statement a lawsuit has been filed in United States District Court for the District of Columbia, *Anderson et al v. Ford et al,* No. 76-1672, filed September 8, 1976, challenging the position of the Commission and alleging a violation of the unlawful contribution statutes. A hearing is scheduled for September 17, 1976, on a preliminary injunction.

Undersigned counsel will seek to obtain and forward to this Court any rulings which issue in this matter as soon as they are available.

CONCLUSION

For these reasons as well it is respectfully submitted that the petition for a writ of certiorari should be granted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A54-74) is not yet reported. The opinions of the district court (Pet. App. A16-54) are reported at 394 F. Supp. 581 and 399 F. Supp. 1292 (S.D. N.Y.).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1976. A petition for rehearing was denied on May 5, 1976. The petition was not filed until June 7, 1976, and is therefore out of time under Rule 22(2) of this Court's rules. In any event the petition lacks merit.

QUESTIONS PRESENTED

1. Whether prosecution violated the *ex post facto* clause of the Constitution.

2. Whether 18 U.S.C. 610 (1970) (the prohibition against corporate campaign contributions) was unconstitutionally vague.

3. Whether venue was properly laid in the Southern District of New York.

STATUTORY PROVISIONS INVOLVED

At the time of the offense charged in the indictment 18 U.S.C. 610 (1970) provided in pertinent part:

> It is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any election at which . . . a Senator [is] . . . to be voted for, . . . or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.
>
> * * * *

At the time of the offense charged in the indictment 18 U.S.C. 591 (1970) provided in pertinent part:

> When used in [section] 610 of this title—
>
> * * * *
>
> The term "contribution" includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable;
>
> The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable:

In 1972 18 U.S.C. 610 was amended to include a definition of "contribution or expenditure" which provides in pertinent part:

> * * * *
>
> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business.
>
> * * * *

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of causing another to accept and receive an illegal corporate campaign contribution, in violation of 18 U.S.C. 610 and 2. He was sentenced to four months' imprisonment and fined $5,000. The court of appeals affirmed in a thorough opinion (Pet. App.) on which we rely.

The evidence is summarized in the opinion of the court below (Pet. App. A56-A60). Briefly it showed that petitioner, a Minneapolis attorney, was the manager of Hubert H. Humphrey's 1970 Senatorial campaign in Minnesota. As part of that campaign, in the spring of 1970, petitioner agreed with the general manager of the Associated Milk Producers, Inc. (AMPI), a dairy cooperative, that it would pay $12,000 toward the Humphrey campaign debt owed to Lennen Newell, Inc. (L & N), a New York advertising agency. Thereafter, petitioner sent AMPI four L & N invoices, each for $3,000, and AMPI in turn drew two $6,000 checks on its corporate account payable to L & N. These checks were sent to petitioner in Minneapolis, and the checks were, thereafter, deposited in the L & N bank account in New York City.

In his own defense, petitioner testified that it was his understanding that any campaign donations from AMPI were to come from the Trust Agricultural Political Education fund, a political fund made up of voluntary donations from the members of AMPI. He also denied that he had seen the L & N checks that AMPI had sent to his office.

ARGUMENT

1. Petitioner contends that he was subjected to *ex post facto* prosecution for causing another to "receive" an illegal campaign "contribution." He asserts that his indictment was returned under the 1972 version of 18 U.S.C. 610, rather than the 1970 version of that statute in force when the offense was allegedly committed, and that the 1970 version was materially different from the 1972 version because it did not include the word "payments" in the definition of "contributions" and therefore could not cover the offense charged in the indictment.

First, petitioner's contention that he was charged under the 1972 version of 18 U.S.C. 610 lacks a factual foundation. Petitioner bases his claim (Pet. 8) on the incompleteness of the statutory citation in the indictment, the similarity of the indictment to the language of the 1972 amendment, and the fact that the 1972 version of the statute was attached to a press release issued by the prosecution. As the courts below stated, however, it is the allegations in the indictment that control. See e.g., *United States* v. *Hamling*, 418 U.S. 87, 117. Thus, the courts below correctly determined that the unexplained episode in which the 1972 statute was appended to the press release had no impact on this issue and that any similarity to the language of the 1972 statute was inconsequential since, "[t]he allegations which spell out the payment by AMPI to L & N for the services it rendered to the Humphrey campaign merely describe the details whereby it is charged the defendant engaged in artifice or subterfuge to conceal the receipt of the contribution." (Pet. A26; A61-62). Likewise because the non-conformity in the indictment, viewed in light of the 1970 version, consisted merely of omission of the definitional section's number and the notation that the statute had been amended, the indictment could not have misled petitioner as to the crime with which he was charged, and there accordingly were no grounds to warrant dismissal Rule 7(c), Fed. R. Crim. P., *United States* v. *Colorabro*, 467 F. 2d 973, 981 (C.A. 2), certiorari denied, 410 U.S. 926; *United States* v. *Riviera*, 513 F. 2d 519, 533, n. 21 (C.A. 2).[1]

Second, petitioner's contention that his prosecution was *ex post facto* lacks a legal foundation. Petitioner asserts that the payment by AMPI to L & N was really an "expenditure" rather than a "contribution," as charged in the indictment, contending that expenditures are indirect payments while contributions include only gifts or direct payments. He then reasons that, since the 1970 version of section 610 did not make it a crime to "receive" an "expenditure," the indictment failed to charge an offense.

But contrary to petitioner's contention, there is no material difference between section 610 as it existed in 1970 when he allegedly committed this offense and section 610 as it existed after amendment in 1972. As this Court held in *Pipefiters* v. *United States*, 407 U.S. 385, the purpose of the 1972 amendment to section 610 was merely "to codify the court decisions interpreting [and the legislative history explicating] section 610...

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[1]The court furthermore observed (Pet. A62) that any doubts petitioner might have entertained as to which version of the statute formed the basis of his indictment should have been resolved by the district court's pretrial ruling on this very issue.

and to spell out in more detail what a labor union or corporation can or cannot do in connection with a federal election." *Id.*, at 410-411. Since there were no substantive changes made in the section, petitioner's prosecution could not have been *ex post facto*.

In any event, it is clear that the payment in this case qualified as a "contribution" within the meaning of the pre-1972 statute. In *United States* v. *Auto Workers*, 352 U.S. 567, this Court, after carefully examining the legislative history of the original statute, concluded that Congress had added the term "expenditures" to section 610 when it passed the Taft Hartley Act in 1947 because certain labor unions were arguing that the term "contribution" covered only direct payments to candidates or political committees and not the union's "expenditure of its own funds to state its position to the world." *Id.* 580. Congress therefore added the proscription against expenditures "in order to avoid the possibility of the emasculation of the statutory policy through a narrow judicial construction of contributions." *Ibid.* Thus, even if "expenditures" were not encompassed by the term "contributions," as Congress in fact believed when it passed the precautionary legislation which added the term "expenditures" to section 610, it is clear that a direct payment to a candidate or political committee, such as is involved here, is a "contribution" as that term has consistently been interpreted.

2. Petitioner next argues that, if the pre-1972 versions of sections 591 and 610 were intended by Congress to reach the conduct alleged in the indictment, they are unconstitutionally vague because a potential receiver could not determine from the statutory language that a payment of a campaign bill by a third party is a "gift, subscription, loan, advance, or deposit" within the meaning of "contribution" and not a "payment" or

"distribution" within the meaning of "expenditure." Petitioner's contention was properly rejected by the courts below (Pet. A32-40; A73-74):

> * * * It borders on the frivolous to suggest that the clearly defined specific prohibition against the receipt or acceptance by any person of union or corporate contributions is so vague that "men of common intelligence must necessarily guess at its meaning." The statutes do not leave judges and jurors free to decide what is permitted and what is prohibited in each case. Their terms are sufficiently clear and definite to meet constitutional scrutiny for vagueness. Moreover, as the Supreme Court has recently stated, "even if the outermost boundaries of [the statute] may be imprecise, any such uncertainty has little relevance here where [defendant's] conduct falls squarely with the 'hard core' of the statute's proscriptions . . ." [footnotes omitted]

As we have already noted, it has never been doubted that a direct payment of the obligation of a campaign committee is a "contribution" within the meaning of section 610. See *United States* v. *Auto Workers*, *supra*. Indeed, this Court, in its recent decision in *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, slip opinion at 72, so construed the term "contribution" in 18 U.S.C. 591 as amended (but for the purposes of petitioner's claim not materially changed from the definition in affect in 1970):

> In Part I we discussed what constituted a "contribution" for purposes of the contribution limitations set forth in 18 U.S.C. § 608(b). We construed that term to include, not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political

> purposes, but also *all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.* [Emphasis added]

Since, as the district court correctly concluded, there is no doubt that the pre-1972 statute was clear enough to provide a person of ordinary intelligence adequate notice that the conduct involved here was illegal, it obviously was not void for vagueness. See e.g., *Buckley* v. *Valeo*, *supra* at 71; *United States* v. *National Dairy Products Corp.*, *supra* at 32-33; *United States* v. *Harriss*, 347 U.S. 612, 617; *Jordan* v. *De George*, 341 U.S. 223, 230; *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Sproles* v. *Binford*, 286 U.S. 374, 393.

3. Finally, petitioner asserts that trial in New York, rather than in Minnesota, was constitutionally impermissible because every element of the transaction, except the actual deposit of the checks, occurred outside New York. Petitioner contends that the offense, if any, consisted of his actions in Minnesota, i.e., causing the unlawful contribution, rather than his causing L & N's receipt of the checks in New York. But clearly the substantive offense charged here is the actual receiving and accepting of an unlawful contribution. Section 2 of title 18 makes punishable as a principal one who willfully causes another to commit an offense but itself does not define a crime. *United States* v. *Gerhart*, 275 F. Supp. 443, 445 (S.D. W.Va); see also, *United States* v. *Bozza*, 365 F. 2d 206, 222 (C.A. 2); *United States* v. *Campbell*, 426 F. 2d 547, 553 (C.A. 2). The constitutional standards for venue concern the locality of the substantive offense rather than the location of the offender. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76; see also *Travis* v. *United States*, 364 U.S. 631, 634.

Venue in the Southern District was constitutionally proper because the deposit of the checks in New York, where the principal offices and officers of L & N were located, constituted the essential element of the offense of accepting and receiving an unlawful contribution. Until the checks were placed in the LTN account, the campaign debt was not discharged and no unlawful contribution had been received. It is established that, when a check is used to make a forbidden payment, venue is proper where the check is deposited. *Burton* v. *United States*, 196 U.S. 283; *United States* v. *McMaster*, 343 F. 2d 176, 181 (C.A. 6), certiorari denied, 382 U.S. 818.[2]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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Special Prosecutor.

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Attorneys.

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[2]This Court's opinion in *Burton* v. *United States*, 202 U.S. 344 (*Burton II*), upon which petitioner principally relies, is inapposite. As the court of appeals noted (Pet. A69, fn. 6), in that case this Court discussed venue only as it related to a new count in the indictment added after this Court's opinion in *Burton I* and charging "agreement to receive a compensation". There this Court upheld the jury's finding that the unlawful "agreement" occurred in Missouri.